Supreme Court, U.S.
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In The

Supreme Court of the United States

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SONIA LaFONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. How is error preserved under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); and

2. What is the standard of review where error was not preserved under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

LIST OF PARTIES

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this Petition.

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OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the District Court, dated March 4, 2005, is reproduced herein in Appendix A at 1. That Summary Order was not selected for publication in the Federal Reporter. The Order of the United States Court of Appeals for the Second Circuit, dated May 3, 2005, which denied without opinion Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc,* is reproduced herein in Appendix A at 6. That Order was not selected for publication in the Federal Reporter. This Court's Order, dated October 4, 2004, which granted Petitioner's Petition for a Writ of *Certiorari*, vacated her judgment of conviction, and remanded her case for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), is reproduced herein in Appendix A at 8. That Order was not selected for publication in the Federal Reporter. The first Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the District Court, dated February 12, 2004, is reproduced herein in Appendix A at 9. That Summary Order was not selected for publication in the Federal Reporter.

BASIS FOR JURISDICTION

On October 4, 2004, this Court granted Petitioner's Petition for a Writ of *Certiorari*, vacated her judgment of conviction, and remanded her case for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The Summary Order of the Court of Appeals, affirming Petitioner's judgment of conviction was entered on March 4, 2005. Thereafter, Petitioner filed a Petition for a Rehearing *En Banc* which was denied without opinion on

May 3, 2005. There has not been an application to extend the time period in which this Petition must be filed. Petitioner seeks review of a final decision by a Federal Circuit Court of Appeals in a criminal case. Thus, jurisdiction for the Petition exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitutional Provisions

> AMENDMENT V
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> AMENDMENT VI
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provisions

Rule 52 (a) and (b), Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention

STATEMENT OF THE CASE

Introduction

This Court's landmark decision and opinion in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), significantly redefined Confrontation Clause jurisprudence by establishing a *per se* bar on the admission of out-of-court testimonial statements made by unavailable declarants when prior opportunity for cross-examination was absent.

However, despite the clarity of the *Crawford* mandate prospectively, it remains ambiguous how appellate courts determine whether a *Crawford* error has been preserved for review and what standard of review should be applied if it is determined that a *Crawford* error has not been preserved. Indeed, such ambiguity increases the significant likelihood of inconsistent and incongruous standards of review being applied to *Crawford* errors, and threatens to eviscerate the meaning of *Crawford* altogether.

Such was the case here, in which the Second Circuit, on remand from this Court for consideration in light of *Crawford*, wrongly determined that Petitioner had not preserved her objection to the erroneous admission of a guilty plea allocution in violation of the Sixth Amendment and *Crawford*, despite clear references by Petitioner's counsel to her objection in the record and despite concession by the government that since she had preserved her objection, "harmless error" analysis was appropriate. As a result, the Second Circuit applied "plain error" analysis and in so doing incorrectly relieved the government of its burden of to establish that the error was harmless beyond a reasonable doubt.[1]

Moreover, in Petitioner's case, the incorrect determination regarding the preservation of her *Crawford* error is particularly troubling in light of Second Circuit's own post-*Crawford* doctrine of treating *Crawford* errors as preserved for purposes of review when there was doubt as to preservation. *See United States v. McClain*, 377 F.3d 219 (2d Cir. 2004) (Court assumed that the Confrontation Clause issue has been preserved for appellate review despite ambiguity in the record).

The Second Circuit further compounded its error by proceeding under ordinary "plain error" analysis, without any recognition of its own "modified plain error" doctrine, which it had previously applied when, as here, a supervening decision has resulted in *constitutional* error. *See United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (noting that in the past the Circuit had applied a "modified plain error rule" in which the government bears the burden of persuasion as to whether substantial rights have been affected).

Finally, even if, *arguendo*, ordinary "plain error" analysis was appropriate here, as this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), "plain error" analysis differs from "harmless error" analysis only with respect to which party bears the burden of persuasion with respect to prejudice. Here, as set forth below, regardless whether or not Petitioner shouldered the burden of persuasion, the introduction of the guilty plea allocution of the doctor who, along with Petitioner, was the named proprietor of the clinic at issue, was so overwhelmingly prejudicial that its cannot be deemed harmless beyond a reasonable doubt or by any other standard.

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[1] The Second Circuit applies a "harmless error" analysis where error is preserved and a "plain error" analysis where it is not. However, as explained **post**, both standards of review require a determination of whether a constitutional error is harmless error beyond a reasonable doubt.

Here, instead of simply shifting the burden of persuasion with respect to prejudice to Petitioner, which Petitioner easily met under any standard, the Second Circuit conducted a selective and incomplete analysis which ignored such essential considerations as: (a) whether the evidence in question had a bearing on an issue that is plainly critical to the jury's decision, such as Petitioner's credibility, when her veracity was central to her defense; and (b) whether the evidence was emphasized in the presentation of the government's case and in its arguments to the jury. *See United States v. Jean-Baptiste,* 166 F.3d 102, 108 (2d Cir. 2004); *see also United States v. Colombo*, 909 F.2d 711, 713 (2d. Circ. 1990).

In so doing, the Second Circuit ignored the issue of prejudice altogether and merely conducted a sufficiency test to arrive at the conclusion that "[t]he erroneous admission of the plea allocution did not affect the outcome of the trial proceedings[.]" *See* Appendix A at 3. The Second Circuit thus failed to apply the appropriate standard of review to the *Crawford* error at trial and deprived Petitioner of an appropriate and meaningful inquiry with respect to prejudice, which was required under any standard of review.

Statement of the Facts

Petitioner Sonia LaFontaine was convicted on July 12, 2000, after a jury trial, on 17 Counts of an 18-Count Superceding Indictment charging a conspiracy to commit mail fraud and health care fraud, mail fraud, health care fraud, witness tampering, conspiracy to engage in monetary transactions in criminally derived property, and engaging in monetary transactions in criminally derived property. On February 20, 2002, Petitioner was sentenced to 135 months' imprisonment. Petitioner was further ordered to pay $918,209 in restitution, and a forfeiture judgment in the amount of $105,784 was entered against her.

During her trial, the government introduced in evidence the guilty plea allocution of Dr. Benito Rish, one of Petitioner's co-defendants. The government presented evidence at trial alleging that the LaFontaine-Rish Medical Associates, a Manhattan medical and surgery clinic (hereinafter "the Clinic"), was engaged in insurance fraud. During the period of the charged conspiracy, the government alleged that the Clinic submitted hundreds of false insurance claims for procedures not covered by insurance, procedures preformed by unlicensed employees, or procedures whose price was significantly inflated. Petitioner's defense was that to the extent such criminal conduct occurred, it was committed by others without her knowledge and/or illicit intent.

The government called 28 witnesses at trial and introduced hundreds of pages of records from the Clinic, insurance claims submitted to insurance companies, and bank records. The defense presented fifteen witnesses. However, the defense was unable to call its principal proposed witnesses, three doctors who worked at the Clinic and who could have established that Petitioner lacked both knowledge of any criminal conduct, and/or any criminal intent, and was therefore not guilty of the crimes charged. Because those witnesses were under indictment – or had indictments pending – and asserted their Fifth Amendment rights, their testimony was not available to Petitioner during her trial.

The Rish Allocution

One of those witnesses, Dr. Benito Rish, a "name" owner and founder of the clinic, had previously pleaded guilty on March 13, 2000, pursuant to a plea agreement with the government. However, Dr. Rish was required to allocute a second time after the District Court found that his initial plea allocution before the Magistrate was not sufficiently specific. Over defense objection, that second allocution was admitted against Petitioner at trial.

Since Dr. Rish had ~~invoked his~~ Fifth Amendment privilege not to testify, he was unavailable. As a result, Petitioner was denied the opportunity to cross-examine Dr. Rish, or to challenge his guilty plea allocution in any effective manner. That prejudice was compounded by the government's reference to that allocution during its closing argument and its allegation that the defense failed to present any evidence to refute the allocution.

This Court's Grant of Certiorari and Remand to the Second Circuit

Petitioner appealed her judgment of conviction and on February 12, 2004, Petitioner's judgment of conviction was affirmed by Second Circuit. On May 11, 2004, Petitioner petitioned this Court for a Writ of *Certoriari*. On October 4, 2004, this Court granted *certoriari*, vacated Petitioner's judgment, and remanded her case to Second Circuit for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). In an October 20, 2004, Order, the Second Circuit directed that the parties simultaneously file letter briefs "with their views on [this case's] disposition in light of" *Crawford* and *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004).

Petitioner asserted that because she had objected to the admission of Dr. Rish's guilty plea allocution at trial, the error was thus subject to "harmless error" review, a fact acknowledged by the government in its reply letter brief. Moreover, Petitioner cited to clear references in the trial transcript in support of the fact that her trial counsel had objected to the error at trial.

Petitioner further asserted that even if the Second Circuit were to find that error was unpreserved, the admission of the guilty plea allocution met the criteria for "plain error" under Rule 52(b), Fed.R.Crim.P., as previously held by the Second Circuit *United States v. Bruno*, 383 F.3d 65, 78-79 (2d Cir. 2004). Thus, even though Ms. LaFontaine did object to the admission of Dr. Rish's plea allocution, the question of preservation of error need not have been addressed, and the Second Circuit should have proceeded directly to evaluation whether the error prejudiced her, which in the context of constitutional error (in this case, with respect to the Sixth Amendment's Confrontation Clause) required an analysis of *whether the error was harmless beyond a reasonable doubt. See also McClain*, 377 F.3d at 222 (Court assumes, without government objection, that the issue was adequately preserved for appellate review).

The Decision on Remand

In its March 4, 2005 Summary Order and Opinion, the Second Circuit found that plain error analysis governed "[b]ecause Ms. LaFontaine failed to preserve her claim[.]" *See* Appendix A at 3. As a result, the Second Circuit stated that "[p]lain error affects a defendant's substantial rights if the error is 'prejudicial' and 'affect[s] the outcome of the district court proceedings[,]" *id., quoting United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002), *and citing United States v. Keigue*, 318 F.3d 437, 441-42 (2d Cir. 2003), and concluded that "[t]he erroneous admission of the plea allocution did not affect the outcome of the trial proceedings." *Id.*

On March 17, 2005, Petitioner filed a Petition for Rehearing with Suggestion for Rehearing *En Banc* with the Second Circuit in which she argued that "in finding that the erroneous admission of a guilty plea allocution, in violation of the Sixth Amendment and the Supreme Court's (subsequent) decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), constituted harmless error, the Second Circuit failed to apply the appropriate standard for such review."

On May 3, 2005, the Second Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc*. The instant Petition followed.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD DECIDE WHETHER PETITIONER'S OBJECTION TO THE INTRODUCTION OF DR. RISH'S GUILTY PLEA ALLOCUTION SUFFICIENTLY PRESERVED HER *CRAWFORD* ERROR FOR APPELLATE REVIEW UNDER THE HARMLESS ERROR STANDARD

As the government conceded in its November 12, 2004, letter, (submitted to the Second Circuit after remand from the Supreme Court), and the Second Circuit concluded in its opinion, *see* Appendix A at 3, the admission of the plea allocution of Dr. Benito Rish, Ms. LaFontaine's partner in the Rish-LaFontaine Clinic that was the subject of the charges in the indictment – was error in light of the this Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

However, the government argued that the admission of the guilty plea allocution was "harmless error" under harmless error analysis. The Second Circuit agreed, but inexplicably found that plain error analysis governed "[b]ecause Ms. LaFontaine failed to preserve her claim[.]" *See* Appendix A at 3. As a result, the panel stated that "[p]lain error affects a defendant's substantial rights if the error is 'prejudicial' and 'affect[s] the outcome of the district court proceedings[,]" *id., quoting United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002), *and citing United States v. Keigue*, 318 F.3d 437, 441-42 (2d Cir. 2003), and concluded that "[t]he erroneous admission of the plea allocution did not affect the outcome of the trial proceedings." *Id.* At 2.

Yet, the Second Circuit's finding that Ms. LaFontaine failed to preserve her objection adequately was unsupported by the record. Nor was it accompanied by any analysis or citation to the record. While, for the reasons detailed **post** at POINT 2, the absence of preservation does not alter the ultimate standard of review (but only which party bears the burden), Ms. LaFontaine did object to the admission of the guilty plea allocution, a fact acknowledged by the government in its December 13, 2004, letter. *See* December 13, 2004 Letter from Assistant United States Attorney Paul B. Radvany, at n. 1 ("[a]s LaFontaine notes, she did object below to the introduction of the allocution. . . . Thus, the appropriate standard for review is harmless error").

In fact, it is clear from the trial transcript[2] that Ms. LaFontaine's trial counsel did object, stating that "[O]ur position has always been that we obviously object to the entry of evidence of Dr. Rish's plea." T. 1263-64.

Although the trial transcript includes two other brief discussions of the allocution, at T. 748-49, and T. 1159, those passages are not substantive, and merely reflect scheduling of a subsequent discussion of the issue. Thus, as the government admitted, Petitioner did indeed object and thus preserved the issue.

Moreover, the Second Circuit's analysis simply failed to follow its own clear doctrine in deciding post-*Crawford* cases presenting the very same issue. For example, in *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004), the Second

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[2] "T" refers to the trial transcript.

Circuit's first comprehensive treatment of *Crawford*,[3] the Second Circuit noted that "[i]t is unclear from the record whether both defendants objected to the admission of the allocutions." 377 F.3d at 322.

Even if here it was unclear that there had been an objection, in *McClain* the Second Circuit added that – as was the case here – "[t]he government has no objection to this assumption." *Id.* *See* December 13, 2004 Letter from Assistant United States Attorney Paul B. Radvany, at n. 1 ("[a]s LaFontaine notes, she did object below to the introduction of the allocution. . . . Thus, the appropriate standard for review is harmless error").

In *McClain*, the Second Circuit "assume[d] for purposes of this opinion . . . that the Confrontation Clause issue has been preserved for appellate review by both defendants." 377 F.3d at 322. At the very least, the Second Circuit should have followed that example, too, if it harbored any doubt (which it should not have) whether Petitioner had preserved her objection.

In light of its decision to treat the error as preserved, in *McClain* the Second Circuit determined that "[t]he erroneous admission of the three plea allocutions is therefore reviewable for harmless error, and does not necessitate a new trial as long as '*the government can show beyond a reasonable doubt that the error complained of did not*

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[3] Indeed, in its October 20, 2004, Order scheduling letter briefing after remand, the Second Circuit directed that the parties address not only *Crawford*, but also *McClain*. *See* Appendix A at 18.

contribute to the verdict obtained.'" *Id.* (emphasis added).[4]

That same harmless error standard should have been applied here as well, but the Second Circuit failed to follow the analysis set forth in *McClain*. Thus the government was improperly relieved of its burden to show – *beyond a reasonable doubt* – that the erroneous admission of Dr. Rish's plea allocution did not contribute to the verdict obtained.

Accordingly, the Second Circuit erroneously determined that the error was not preserved, and then did not adhere to its own precedent with respect to the appropriate standard of review.

2. THIS COURT SHOULD DECIDE WHETHER, EVEN IF PETITIONER HAD NOT PRESERVED HER *CRAWFORD* ERROR FOR REVIEW, THE SECOND CIRCUIT FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW

A. The Second Circuit Failed to Apply the Appropriate Plain Error Standard of Review

As this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), "plain error" analysis differs from "harmless error" analysis only with respect to which party bears the burden of persuasion under with respect to prejudice:

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[4] In *McClain*, the Second Circuit held that the error was harmless beyond a reasonable doubt. 377 F.3d at 323.

> when the defendant has made a timely objection to error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called "harmless error" inquiry to determine whether the error was prejudicial. Rule 52 (b) normally requires the same kind of inquiry, with one important difference: It is the defendant who bears the burden of persuasion with respect to prejudice.

507 U.S. at 734.

In fact, the Second Circuit, in *United States v. Bruno*, 383 F.3d 65, 79 (2d Cir. 2004), recognized that distinction when it explained that the only difference in analysis between ordinary error and plain error [the latter under Rule 52(b), Fed.R.Crim.P.] is that plain error places the burden of persuasion upon the defendant rather than the government.

However both standards share the requirement that, in order to be harmless, *constitutional error* such as the denial of the right to confrontation must be *harmless beyond a reasonable doubt. See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The appropriate inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered . . . was surely unattributable to the error." *Chapman v. California*, 386 U.S. 18, 24 (1967). Therefore, the error "cannot be 'harmless' if there 'is a reasonable possibility that the improperly admitted evidence contributed to the conviction.'" *Holland v. Scully*, 797 F.2d 57, 67 (2d Cir.1986).

Indeed, in *Bruno*, the Second Circuit recognized that the unconstitutional admission of evidence "is not harmless unless [the court] can conclude with fair assurance that [this] evidence did not substantially influence the jury," and such an erroneous admission "may be deemed harmless only if it is highly probable that the error did not contribute to the verdict." *United States v. Bruno*, 383 F.3d at 79, *quoting United States v. Jean-Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999).[5]

Moreover, the evaluation is not a "sufficiency test." *Henry v. Scully*, 918 F. Supp. 693, 718 (S.D.N.Y. 1995), *aff'd* 78 F.3d 51 (2d Cir. 1996). Rather, for the error to be harmless, the evidence properly admitted must be "so overwhelming, and the prejudicial effect [of the error] so insignificant by comparison . . ." *Schneble v. Florida*, 405 U.S. 427, 430 (1972).

Here, despite the fact that the essential inquiry under both the harmless and plain error standards is whether the error was prejudicial, the Second Circuit interpreted the plain error standard as merely requiring a sufficiency test, in finding that other evidence established the Petitioner's participation in the conspiracy. *See* Appendix at 3. However, a proper evaluation of the prejudice Petitioner suffered as a result of the error was essential because even if the evidence erroneously admitted may not have been as important as other components of the case, it may have tainted the jury view of every other piece of evidence in the case. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). Moreover, instead of shifting the burden of persuasion with regard to prejudice from the government to Petitioner in the context of "plain error" analysis, the Second Circuit ignored the issue of prejudice altogether.

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[5] The Court in *Bruno* also cites *McClain* (as a "cf." cite), including the "harmless beyond a reasonable doubt" standard, in holding (in *Bruno*) that it could not conclude that the guilty plea allocution admitted "did not substantially influence the jury's verdict." 383 F.3d at 80.

In addition, the Second Circuit failed to apply its own "modified plain error" jurisprudence that it has applied when, as here, a supervening decision has resulted in constitutional error such as the denial of the right to confrontation:

> [w]hen, as here, the source of the alleged error is a supervening judicial decision that alters "a settled rule of law in the circuit," we have in the past applied a "modified plain error rule" in which the Government bears the burden of persuasion as to whether substantial rights have been affected.

United States v. Bruno 383 F.3d at 79, *quoting United States v. Thomas,* 274 F.3d 655, 668 n. 15 (2d Cir. 2001) (*en banc*) and *United States v. Santiago,* 238 F.3d 213, 215 (2d Cir.2001).

Here, despite the fact that this Court's supervening opinion in *Crawford* clearly altered a settled rule of law resulting in constitutional error, the Second Circuit purported to apply an "ordinary" plain error analysis. As a result of its failure to apply the proper standard, the Second Circuit not only relieved the government of its burden of persuasion as to whether Petitioner' s substantial rights had been affected, but compounded its error by ignoring the issue of whether petitioner was prejudiced altogether.

Thus, under any standard, the Second Circuit should not have merely considered whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered – in essence, a sufficiency test – but also such critical factors as whether Dr. Rish's plea allocution affirmatively prejudiced Petitioner, i.e., whether it had a bearing on Petitioner's credibility, when her veracity was central to her defense, and whether the plea allocution was emphasized in the presentation of the government's case and in its arguments to the jury. *See United States v. Jean-Baptiste,* 166 F.3d 102, 108 (2d Cir. 2004); *see also United States v. Colombo*, 909 F.2d 711, 713 (2d. Circ. 1990).

Moreover, the ambiguity in the Second Circuit over how an error is preserved under *Crawford*, whether to deem error preserved for review where preservation is ambiguous, what the appropriate standard of review is when error is not preserved, and whether there is a "modified plain error" rule applicable to *Crawford* errors, significantly increases the likelihood of inconsistent and incongruous standards of review being applied to *Crawford* errors and threatens to eviscerate the meaning of *Crawford* altogether.

Indeed, the failure of the Second Circuit to apply consistent and appropriate standards of review to *Crawford* errors, threatens to seriously affect the fairness, integrity or public reputation of judicial proceedings regardless of a defendants actual innocence. The result is a public perception that the *Crawford* decision is impotent because *Crawford* errors will not be subjected to meaningful or appropriate scrutiny by the lower court. Thus while *Crawford* may mark a new era in Sixth Amendment jurisprudence prospectively, its retrospective application to cases already in the pipeline has been reduced to a nullity.

B. *The Admission of Dr. Rish's Guilty Plea Allocution Was Overwhelmingly Prejudicial And Therefore Not Harmless Under Any Standard of Review*

The erroneous introduction of Dr. Rish's guilty plea allocution, was so overwhelmingly prejudicial that it could not be found harmless regardless of the standard of review. While the government cited testimony that it believes renders the admission of Dr. Rish's guilty plea allocution harmless, it bears noting that all of that testimony was subjected to cross-examination – a process that revealed that those witnesses were all cooperating witnesses with non-prosecution agreements. In addition, the witnesses who were employed at the clinic admitted to other crimes, including embezzlement from the clinic, and their own fraud upon the insurance companies.

In contrast, only Dr. Rish's allocution was spared cross-examination, which is the very vice condemned in *Crawford*. The nature and use of Dr. Rish's guilty plea allocution must be viewed in context of the case, and the critical gaps in the government's case that evidence was designed to fill – here, the existence of the conspiracy may have been established, but it was Dr. Rish's allocution that placed it unmistakably at the highest levels of the clinic.

Only through Dr. Rish's allocution could the jury infer that Petitioner, his non-physician partner in management (but who, in her prior experience in Canada, did not have any cause for familiarity with insurance forms or processes), knowingly and intentionally participated in the fraud.

In that context, to whom else (but Petitioner) could Dr. Rish have been referring when he identified "others" who were involved in the fraud? Certainly any rational juror would have made that connection, as Dr. Rish surely did not have to implicate others at the clinic who had already pleaded guilty and/or received non-prosecution agreements in return for their testimony.

Indeed, in earlier colloquy, the government told the District Court that it wanted to introduce the allocution at a particular point because "it is directly relevant to [the] testimony" of Ana Reyes, T. 750, a former clinic employee and important government witness (her testimony consumed more than 300 pages) who was thoroughly impeached with her own crimes and fraud upon the government and insurance companies.

Yet the government was able to use Dr. Rish's allocution to buttress Ms. Reyes's testimony. The government cannot be permitted to cite the specific relevance of a piece of evidence to ensure its admission, introduce at a time calculated to corroborate the testimony of an integral witness, utilize it in summation to corroborate other witnesses who have been subject to cross-examination (as detailed below), and then later claim the evidence did not influence the verdict. Again, that would be directly contrary to the meaning of *Crawford*.

While the District Court issued a limiting instruction attendant to the reading of Dr. Rish's allocution to the jury, the allocution itself, as well as the use to which the government put it during summation, both exceeded the bounds of that instruction (which conformed to the law in this Circuit pre-*Crawford*), and irremediably prejudiced Petitioner even further.

In addition, even though the District Court instructed the jury to consider Dr. Rish's testimony simply for purposes of establishing the existence of the charged conspiracy, explicitly emphasizing to the jury that Dr. Rish's statements were not to be used to draw conclusions about the defendant's activities or knowledge, T. 1592-93, the allocution, and the use to which the government put, it, exceeded that ostensibly (but nevertheless now improper) purpose.

For example, Dr. Rish's plea allocution included the following: "[w]hile working [at the clinic] I came to the realization that *others* were submitting claims to the insurance companies for procedures that were not covered by insurance making them look like they were covered." T. 1592 (emphasis added).

Thus, the allocution itself was not limited simply to establishing a conspiracy, or confirming Dr. Rish's guilt alone. Instead, the reference to "others" clearly accuses others of participation in the conspiracy and underlying offenses – all without the opportunity for cross-examination. Since the clinic's name was the Rish-LaFontaine Clinic, the jury did not have to go very far to include Petitioner as a co-conspirator based on Dr. Rish's allocution.

Moreover, since Dr. Rish's allocution suggested that he participated in only a minor fashion in the ongoing conspiracy – a conspiracy he claimed to have discovered but neither concocted nor initially implemented – that allocution, testimony that Petitioner could not challenge, pointed the finger even more directly at Petitioner.

The prejudice Petitioner suffered as a result of the admission of Dr. Rish's guilty plea allocution was amplified during the government's summation, in which the government repeatedly relied on Dr. Rish's testimony in an effort to tie Ms. LaFontaine to the charged conspiracy, and to implicate Petitioner in illegal overt acts for which Dr. Rish admitted guilt, and in which Petitioner denied any participation.

In fact, the Government invoked Dr. Rish's guilty plea no less than three different times during summation in an effort to entangle Petitioner in Dr. Rish's admitted criminal conduct, and to rebut Petitioner's trial testimony, in which she asserted her lack of participation in the charged criminal conduct.

The government argued that

> [y]ou'll remember the surgeon for each one of [the patients] is Dr. Rish, and you know he's involved in the conspiracy. The defendant told Ana Reyes 'Don't worry about Dr. Rish, I'll take care of him.' *But most important you know he pled guilty.*

T. 3299 (emphasis added).

Thus, the government's use of Dr. Rish's allocution went well beyond even the limiting instruction, much less that which would be acceptable under *Crawford*. The government's argument cited above also dovetails with Dr. Rish's claim in his allocution that he did not orchestrate the conspiracy, but merely joined it as a passive member manipulated by its architect – with the government filling in the blank easily with Petitioner's name.

Moments later, the government again referred to Dr. Rish's plea allocution, re-reading his entire allocution. T. 3303. The government then asserted, "[w]hat does that tell you? Well, it tells you that the patients who told you they had tummy tucks, but they billed for hernias, by Dr. Rish were telling you the truth." T. 3303.

Thus, again the government transcended the parameters of the limiting instructions by using Dr. Rish's plea allocution to corroborate the testimony and buttress the credibility of other witnesses, all in stark violation of the Sixth Amendment's Confrontation Clause.

The government also attacked Petitioner through her associations, implying transitive guilt. The government asked during summation, "[w]hat else do you know about the defendant? Well, you know she's very close to the two other main participants in this conspiracy, Dr. Rish and her husband. By her own admission, she's known Dr. Rish for 20 plus years." T. 3307-08.

Once again, the implication is patent: since Dr. Rish pleaded guilty, and since Dr. Rish and the defendant had known each other for more than two decades, the defendant must have known about the conspiracy and participated in it. Shielded from cross-examination, the allocution underlying that argument embodies all of the evils condemned in

Crawford.

Thus, Dr. Rish's guilty plea allocution was prejudicial and overwhelmingly so, in both its content and its repeated use by the government in summation to bolster its case. As a result, admission of Dr. Rish's guilty plea cannot constitute harmless error beyond a reasonable doubt, or by any other standard.

Significantly, the lower court's failure to conduct an appropriate and meaningful inquiry into the prejudice, required under any standard of review, renders the retrospective effect of *Crawford* a nullity, and denies defendants whose cases are already in the pipeline any meaningful benefit from this significant change in Sixth Amendment jurisprudence.

Moreover, the District Court is in a superior position to determine the prejudicial impact of the guilty plea allocution upon Petitioner's verdict . In its Summary Order, the Second Circuit's recitation of the facts includes only the government's interpretation of the 3,000 page trial record, without any reference to Petitioner's position (communicated in the letter briefing). Yet it is impossible for the parties to distill an entire trial record – or for the Second Circuit to make a considered determination whether an error was harmless – based on limited letter briefing.

Therefore, the Second Circuit should have remanded the matter to the District Court for an initial determination. Indeed, the matter has been remanded to the District Court pursuant to *United States v. Booker,* 543 U.S. __, 125 S.Ct. 738 (2005),and *United States v. Crosby*, 397 F.3d 103 (2d Circ. 2005) and, as the Second Circuit has repeatedly noted with respect to determinations of materiality in the context of post-trial motions, the District Court, having presided over the trial, is in a far better position to evaluate the prejudicial impact of evidence upon the verdict. *See, e.g., United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997), *citing United States v. Rivalta*, 925 F.2d 597, 597 (2d Cir. 1991), *and quoting United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir. 1980). *See also United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995) (ordinary justification for deference to the District Court is enhanced when the trial presents complicated issues).

Accordingly, the Second Circuit's failed to apply the appropriate standard of review to the *Crawford* error in Petitioner's case and instead conducted a cursory and incomplete sufficiency test. As a result, Petitioner was deprived of a meaningful and genuine inquiry into the prejudice she suffered as a result of the erroneous introduction of Dr. Rish's guilty plea allocution. Had the Second Circuit conducted such an inquiry, it would have necessarily concluded that error was not harmless under any of the applicable standards of review, irrespective of which party had the burden of persuasion.

Conclusion

Therefore, for all of the reasons set forth above, it is respectfully submitted that this Petition for a Writ of *Certiorari* should be granted, and the Court of Appeals decision reversed and a new trial ordered. In the alternative, this Court should remand for application of the appropriate standard of review for the *Crawford* error in Petitioner's case.

Dated: July 11, 2005
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
JOSHUA L. DRATEL, P.C.
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New York, New York 10005
(212) 732-0707

Attorneys for Petitioner
Sonia LaFontaine

-Of Counsel-
Kristian K. Larsen

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 4th day of March, two thousand and five.

PRESENT:

HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges.

- x

UNITED STATES OF AMERICA,

Appellee,

-v.-

SONIA LAFONTAINE, aka
"Sonia Fromme,"

Defendant-Appellant,

ARTHUR KISSEL, aka
"Arthur Fromme,"

Defendant.

- x

SUMMARY ORDER
No. 02-1232
(Filed Mar. 4, 2005)

FOR APPELLANT:	JOSHUA L. DRATEL, New York, NY
FOR APPELLEES:	PAUL B. RADVANY, Assistant United States Attorney (David Kelly, United States Attorney for the Southern District of New York, *on the brief*), New York, NY.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Mukasey, C.J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED IN PART and REMANDED IN PART.

Defendant-appellant Sonia LaFontaine appeals from a judgment of conviction and subsequent sentence imposed by the United States District Court for the Southern District of New York (Mukasey, C.J.), following a six-week jury trial. The charges presented at trial all related to insurance fraud and money laundering schemes involving LaFontaine's cosmetic surgery clinic, LaFontaine-Rish Medical Associates ("LRMA"). This Court affirmed the conviction by summary order on February 12, 2004. *United States v. LaFontaine,* No. 02-1232, 87 Fed. Appx. 776, 2004 WL 260645 (2d Cir. Feb 12, 2004) (*"LaFontaine I"*). The mandate issued on March 4, 2004. On October 4, 2004, the Supreme Court vacated the judgment and remanded to this Court for further consideration in light of *Crawford v. Washington,* 541 U.S. 36 (2004). *LaFontaine v. United States,* 125 S. Ct. 46 (2004). This Court directed counsel to submit briefs in light of *Crawford* and *United States v. McClain,* 377 F.3d 219 (2d Cir. 2004). We assume the parties' familiarity with the factual and procedural background of this action.

The admission of Dr. Rish's plea allocution was error, in light of *Crawford*. *See McClain*, 377 F.3d at 222 (holding plea allocutions to be testimonial hearsay admitted in violation of Confrontation Clause when appellants lacked prior opportunity to cross-examine declarants). Because LaFontaine failed to preserve her claim, however, we review for plain error. *See id.* Plain error review requires a court to find "1) an error, 2) that is plain, 3) that affects substantial rights." *United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002). As we are satisfied that the first two requirements have been met, we concern ourselves only with the third. Plain error affects a defendant's substantial rights if the error is "prejudicial" and "affect[s] the outcome of the district court proceedings." *Id.* at 193 (internal quotation marks and citation omitted); *see also United States v. Keigue*, 318 F.3d 437, 441-42 (2d Cir. 2003).

The erroneous admission of the plea allocution did not affect the outcome of the trial proceedings. Other evidence adduced at trial overwhelmingly established both the existence of the conspiracy, as well as LaFontaine's participation in it. This evidence included, *inter alia*, the testimony of numerous former LRMA patients and employees establishing LaFontaine's hands-on role in the fraud, documentary evidence such as fabricated patient records created at LaFontaine's direction, and a tape recording in which LaFontaine instructed an LRMA employee to lie to the FBI regarding the case. The jury had before it evidence that LaFontaine owned, operated, and profited from the clinic, performed some of the surgical procedures that were fraudulently billed to insurance companies, supervised the corrupted billing process, tampered with witnesses, fabricated documents and destroyed authentic ones, and lied during her testimony. In addition, the allocution was admitted pursuant to a limiting instruction that the jury could use the admissions contained therein only as proof of the conspiracy's existence, and Dr. Rish's conduct in furtherance of it, and not as evidence that LaFontaine participated in the conspiracy.

LaFontaine further argues in her recent briefings that her Fifth Amendment right to present a defense was violated in light of *United States v. Chin*, 371 F.3d 31 (2d Cir. 2004), as the district court precluded the admission of tape recordings LaFontaine sought to introduce at trial. This argument lacks merit, for the reasons we stated in *LaFontaine I*.

LaFontaine has filed a motion for bail on the basis of *Crawford* and the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In light of this Court's decision in *United States v. Crosby*, No. 03-1675, 2005 WL 240916, 2005 U.S. App. LEXIS 1699 (2d Cir. Feb. 2, 2005) this case is remanded to the district court for further proceedings in conformity with *Crosby*. The order previously issued in LaFontaine's appeal is reaffirmed in all respects except as modified by this order. Any appeal taken from the district court following this remand can be initiated only by filing a new notice of appeal. *See* Fed. R. App. P. 3, 4(b).

For the foregoing reasons, the district court's judgment is AFFIRMED IN PART and REMANDED IN PART. The motion for bail is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK

/s/ Lucille Carr
By:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May two thousand five.

(Filed May 3, 2005)

UNITED STATES OF AMERICA,

Appellee,

v. Docket # 02-1232

SONIA LAFONTAINE,
also known as Sonia Fromme,

Defendant-Appellant,

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Sonia Lafontaine. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Arthur Heller
Motion Staff Attorney

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 4, 2004

Mr. Joshua Lewis Dratel
14 Wall Street, 28th Floor
New York, NY 10005

Re: Sonia LaFontaine, aka Sonia Fromme
v. United States
No. 03-1540

Dear Mr. Dratel:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit, for further consideration in light of Crawford v. Washington, 541 U. S. ___ (2004).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

William K. Suter, Clerk

87 Fed.Appx. 776

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Sonia LAFONTAINE, aka "Sonia Fromme,"
Defendant-Appellant,
Arthur Kissel,
aka "Arthur Fromme," Defendant.

No. 02-1232.

Feb. 12, 2004.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Mukasey, C.J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Julia Pamela Heit and Vivian Shevitz, New York, NY, for Appellant.

Paul B. Radvany, Assistant United States Attorney (James B. Comey, United States Attorney for the Southern District of New York, on the brief; Gary Stein, Assistant

United States Attorney, of counsel), New York, NY, for Appellees.

PRESENT: *LEVAL, SOTOMAYOR*, and *WESLEY*, Circuit Judges.

SUMMARY ORDER

Defendant-appellant **Sonia LaFontaine** appeals from a judgment of conviction and subsequent sentence imposed by the United States District Court for the Southern District of New York (Mukasey, C.J.), following a six-week jury trial. The charges presented at trial all related to insurance fraud and money laundering schemes involving LaFontaine's cosmetic surgery clinic, LaFontaine-Rish Medical Associates ("LRMA"). On appeal, LaFontaine raises various challenges to her conviction and sentence, all of which we find to be without merit.

LaFontaine argues that, as part of its plea agreement with Dr. Rish, whereby the government was permitted to introduce Rish's plea allocution as evidence against LaFontaine, the government was obliged to immunize Rish, or otherwise require him to testify at LaFontaine's trial. Because LaFontaine never raised this claim before the district court, we review for plain error, *United States v. Brown,* 352 F.3d 654, 663 (2d Cir.2003); *see also United States v. Crowley,* 318 F.3d 401, 415 (2d Cir.2003) (defining "plain error" as that which is a "clear or obvious deviation from current law that affected the outcome of the district court proceedings") (internal quotation marks omitted), and find none. Plea allocutions of co-conspirators have routinely been introduced into evidence without the attendant requirement that the pleading co-conspirator testify at another defendant's trial. *See United States v. Petrillo,* 237 F.3d 119 (2d Cir.2000); *United States v. Moskowitz,* 215 F.3d 265 (2d Cir.2000). This is particularly the case where, as here, the pleading co-conspirator has not been granted immunity, and therefore, is free to invoke his Fifth Amendment right not to testify. To the extent that LaFontaine argues that the district court should have compelled Rish's immunization, this claim is unavailing. "Absent extraordinary circumstances, the Due Process Clause imposes no requirement that defense witness immunity be ordered" by the court. *United States v. Diaz,* 176 F.3d 52, 115 (2d Cir.1999) (internal quotation marks and citation omitted). Where, as here, "the witness [himself] is a prosecution target," such extraordinary circumstances do not exist. *United States v. Shandell,* 800 F.2d 322, 324 (2d Cir.1986). Moreover, because LaFontaine did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense, the district court was under no obligation to compel Rish's immunization.[1]

LaFontaine also challenges the district court's decision to exclude dictation tapes, which she claims were "made by doctors who had performed medical procedures on patients named in the indictment," for lack of authentication. Reviewing the district court's exclusion of the tapes for abuse of discretion, *United States v. Taubman,* 297 F.3d 161, 164 (2d Cir.2002), we find none. LaFontaine argues that she was unable to authenticate the tapes, as required by Fed.R.Evid. 901(a), because the doctors heard on the tapes were unavailable to testify. The court, however, invited LaFontaine to use alternative means to authenticate the tapes, and she failed to do so. To the extent that LaFontaine argues that the tapes were admissible under Rule 806 for impeachment purposes, such a claim was not raised below, and is now reviewed for plain error. *See Crowley,* 318 F.3d at 414. Because the government did not introduce hearsay statements by the doctors at trial, the challenged tapes could not have been used for impeachment purposes. Further, because LaFontaine has failed to show that introduction of the tapes would have resulted in her acquittal, there was no plain error.

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[1] We note that, in her brief, LaFontaine argued that the district court should have compelled the government to immunize Drs. Spektor and Zizza in order to permit them to testify at trial. At oral argument, however, LaFontaine conceded that this claim was without merit, as Drs. Zizza and Spektor had not reached agreements with the government at the time of trial.

LaFontaine next contends that the district court abused its discretion by excluding certain witness testimony on the ground that it was irrelevant or cumulative. Trial courts enjoy broad discretion over the admission of evidence, and this Court "will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir.1998) (internal quotation marks omitted). There is no such showing here. In our view, the excluded testimony of the various prospective witnesses was either irrelevant, cumulative, collateral, or at worst harmless error.

LaFontaine also claims that the district court's refusal to adjourn the trial and authorize the deposition of Arthur Kissel, LaFontaine's husband and co-defendant, constituted an abuse of discretion because it "undermined [her] right to present a balanced defense." The decision to permit or deny leave to conduct a Rule 15 deposition "rests within the sound discretion of the trial court." *United States v. Gigante,* 166 F.3d 75, 81 (2d Cir.1999) (internal quotation marks and citation omitted). There is no indication that the district court's decision constituted an abuse of discretion.

LaFontaine also contends that the district court abused its discretion by excluding statements made by Dr. Rish and Kissel to Kristine Haave, the fraud investigator who testified at trial. These statements, LaFontaine maintains, were admissible under Rule 801(d)(2)(E) as statements by a co-conspirator made in furtherance of a conspiracy. Because Rule 801(d)(2)(E), however, requires that the party against whom the statement is offered be a party to the conspiracy, it is clear that such a statement may not be introduced against the government in a criminal case. *See United States v. Abbas,* 74 F.3d 506, 511 (4th Cir.1996); *United States v. Kapp,* 781 F.2d 1008, 1014 (3d Cir.1986). To the extent that LaFontaine argues that the statements were also admissible under Rule 806, this argument was not raised below, and we find no plain error in the district court's ruling. Rule 806 permits the use of such evidence for impeachment purposes; here, however, LaFontaine sought to introduce the statements to prove the truth of the matter asserted – that Kissel and Rish committed the billing fraud. Further, LaFontaine fails to show that she was unduly prejudiced by the exclusion, as the "exculpatory" nature of the statements is not apparent. Thus, these statements were properly excluded.

We reject LaFontaine's claim that the district court abused its discretion by excluding expert testimony that certain medical procedures could be delegated to unlicensed individuals on the ground that the testimony was irrelevant to the issues presented at trial. For substantially the reasons stated by the district court at trial, the proposed expert testimony was irrelevant to the fraud issues raised at trial and was properly excluded. To the extent that LaFontaine objects to the district court's decision not to charge the jury on the permissibility of delegation to unlicensed individuals under New York law, we also reject her claim. LaFontaine has not shown that the requested charge "accurately represented the law in every respect," and that she was prejudiced by the charge given. *United States v. Mulder,* 273 F.3d 91, 105 (2d Cir.2001). Indeed, the requested charge was an incorrect statement of New York law, and LaFontaine was not prejudiced by the charge given, as the district court properly charged the jury on all of the elements of the government's case. Accordingly, LaFontaine's claim fails.

LaFontaine challenges her sentence on a number of grounds. First, she argues that the district court erred in denying her a *Fatico* hearing, thereby precluding her from presenting evidence concerning her role in the offense and the amount of loss for which she was responsible. Reviewing the district court's decision for abuse of discretion, *United States v. Slevin,* 106 F.3d 1086, 1091 (2d Cir.1996) (noting that the district court enjoys broad discretion to determine the procedure by which sentencing issues will be resolved, so long as the defendant is given the opportunity to rebut the government's allegations), we find none. Where, as here, the district court concluded that the defendant had ample opportunity at trial and in her sentencing submissions to rebut the government's allegations concerning role and loss amount, it was under no obligation to hold a *Fatico* hearing.

Second, LaFontaine also contends that the sentencing court improperly calculated the loss involved in the offense. Specifically, LaFontaine claims that the court should have discounted the "intended loss" – the full amount of LaFontaine's fraudulent claims – because LaFontaine knew when the claims were submitted that LRMA would not be reimbursed for the full amount. She further argues that, because the patients received some treatment, the intended loss figure should be discounted to reflect the amount that would have been reimbursed by the insurance companies for the procedures that were actually performed. We find no clear error in the district court's calculation. *United States v. Franklyn,* 157 F.3d 90, 97 (2d Cir.1998). The district court need not compute the loss sustained "with precision," but rather, "need only make a reasonable estimate of the loss, given the available information." *United States v. Jacobs,* 117 F.3d 82, 95 (2d Cir.1997) (quotation marks and citation omitted). For substantially the reasons set forth by the court at sentencing, we agree that the government's loss calculation was a conservative calculation upon which the court could rely in determining the loss amount.

Third, LaFontaine also argues that the district court's upward departure for multiple acts of obstruction of justice was improper, and that the court should have imposed the standard two-level departure mandated by U.S.S.G. § 3C1.1. Although § 3C1.1 provides a two-level enhancement for obstruction of justice, it is well settled that a sentencing court may depart upwardly if a defendant engages in "multiple acts of obstruction" that fall outside the heartland conduct contemplated by § 3C1.1. *United States v. Ventura,* 146 F.3d 91, 97 (2d Cir.1998). Reviewing the sentencing court's decision to depart upwardly for reasonableness, *see* 18 U.S.C. § 3742(e)(3)(c), we find that, for substantially the reasons stated by the court at sentencing, the court's six-level enhancement was eminently reasonable given LaFontaine's various and numerous acts of obstruction.

Fourth, LaFontaine further contends that the district court's imposition of a two-level enhancement for conscious or reckless risk of serious bodily injury was an abuse of discretion because the injuries claimed by LRMA patients were "normal complaints of surgical recovery," and the procedures performed by LaFontaine did not pose a risk of serious bodily injury. For substantially the reasons provided by the court at sentencing, we agree that LaFontaine's conduct exposed LRMA patients to "the conscious or reckless risk of serious bodily injury," U.S.S.C. § 2F1.1(b)(4)(A) (1997), and in some cases, actually resulted in injuries to patients. Accordingly, the two-level enhancement was proper.

Fifth, LaFontaine also maintains that the district court's imposition of U.S.S.G. § 3B1.1's leadership role enhancement was improper because she was not a leader or organizer of the conspiracy. She further claims that the sentencing court improperly relied on evidence related to the offense conduct, rather than her role in the offense, in determining whether the role enhancement was applicable. We disagree. The reasons set forth by the court at sentencing clearly indicate that the court properly applied the leadership enhancement.

Sixth, LaFontaine further maintains that the sentencing court's decision not to depart downwardly, based on the alleged disparity between her sentence and that of her co-conspirators Drs. Rish and Spektor, was an unconstitutional application of the Sentencing Guidelines. We have established that a disparity in the sentences of co-defendants "is not a proper basis for [a] downward departure," *United States v. Tejeda,* 146 F.3d 84, 87 (2d Cir.1998) (internal quotation marks omitted), even where the disparity is the result of prosecutorial discretion in the plea bargaining process, *United States v. Stanley,* 928 F.2d 575, 579-82 (2d Cir.1991). As the sentencing court noted, LaFontaine "was in a different position from that of the other defendants," as she profited from the scheme far more than did Drs. Rish and Spektor. Given these considerations, it is clear that the court's decision not to exercise its departure authority was not clearly erroneous.

Finally, LaFontaine contends that the sentencing court erred in failing to group the money laundering charges with the fraud charges, as required under the November 2001 Sentencing Guidelines. This claim is completely without merit. The sentencing court correctly applied the November 1997 Sentencing Guidelines, which did not require grouping of the fraud and money laundering charges, but were more favorable to LaFontaine than the November 2001 Sentencing Guidelines. *See United States v. Sabbeth,* 277 F.3d 94, 99 (2d Cir.2002) (requiring that the district court apply the Guidelines version in effect at the time of the offense conduct if it would result in a less severe sentence than the version in force at the time of sentencing). Under the November 1997 Sentencing Guidelines, money laundering and fraud charges are not grouped unless they are tightly interwoven and involve the same victims. *See* U.S.S.G. § 3D1.2(a) (1997). As the sentencing court noted here, the charges were not tightly interwoven and involved two different sets of victims – the insurance companies, and the banking system and society at large. Accordingly, the sentencing court's decision not to group these charges was appropriate.

For these reasons, the judgment of the district court is AFFIRMED.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 20th day of October, two thousand and four,

Present:

Hon. Pierre N. Leval,
Hon. Sonia Sotomayor,
Hon. Richard C. Wesley,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

SONIA LAFONTAINE,
also known as Sonia Fromme,
Defendant-Appellant,

ARTHUR KISSEL,
also known as Arthur Fromme,
Defendant.

Docket No. [s]: 02-1232
(Filed Oct. 20, 2004)

Before determining what is the appropriate disposition of the above case following the remand from the Supreme Court, the panel directs counsel to respond with their views on that disposition in light of *Crawford v. Washington*, 124 S.Ct. 1354 (2004), and *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004).

Such response from counsel is to be filed with the Clerk of the court no later than two (2) weeks from the date of this Order, and be limited to a brief that may be in the form of a letter, not to exceed five (5) pages. Response briefs of no more than three (3) pages may be filed by counsel for both parties within one (1) week thereafter.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA

V.

SONIA LAFONTAINE,
a/k/a "Sonia Froom"

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
S3 1:98CR.00251-001(MBM)

John Pollok, Susan Wolffe and Roger Bennett Adler
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) ______________________

☐ pleaded nolo contendere to count(s) ______________ which was accepted by the court

XX was found guilty on count(s) one through nine, eleven through eighteen, and the forfeiture allegation after a plea of not guilty

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to commit mail and health fraud	In or about early 1998	1
18 U.S.C. §§ 1341 and 2	Mail fraud	8/31/95	2

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

____

Count(s) ________________ ☐ is ☐ are dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
584-03-7735

Defendant's Date of Birth:
August 8, 1946

Defendant's USM No.
41537-054

Defendant's Residence Address:

61 West 62nd Street
Apartment 23F
New York New York 10023

Defendant's Mailing Address:

61 West 62nd Street
Apartment 23F
New York New York 10023

February 20, 2002
Date of Imposition of Judgment

/s/ [Illegible]
Signature of Judicial Officer

Michael B. Mukasey, U.S.D.J.
Name and title of Judicial Officer

March 15, 2001
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/24/95	3
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/17/95	4
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/18/94	5
18 U.S.C. §§ 1341 and 2	Mail Fraud	12/27/95	6
18 U.S.C. §§ 1341 and 2	Mail Fraud	5/20/96	7
18 U.S.C. §§ 1341 and 2	Mail Fraud	8/9/95	8
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/20/95	9
18 U.S.C. §§ 1347 and 2	Health care fraud	In or about early 1998	11
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about late 1996	12
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about 1998	13
18 U.S.C. § 1956(h)	Conspiracy to engage in monetary transaction with criminally derived property	In or about 1998	14

18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	12/11/95	15
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	2/23/96	16
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	4/2/96	17

RIDER A

Title & Section	Nature of Offense	Date Offense Concluded	Count #
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	6/27/96	18
18 U.S.C. § 982	Forfeiture Allegation	N/A	No #

On motion by the government the superseded indictment, and superseding indictments S1 98 Cr. 251 (MBM) and S2 98 Cr. 251 (MBM) are dismissed as to defendants Sonia LaFontaine; as is Count 10 of superseding indictment, S3 98 Cr. 251 (MBM).

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 135 months.

X The court makes the following recommendations to the Bureau of Prisons:
Consistent with defendant's security classification as designated by the United States Bureau of Prisons and the length of her sentence, defendant should be assigned to a correctional facility as close to Florida as possible where she can receive appropriate medical treatment.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ___________ ☐ a.m. ☐ p.m. on ________________
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of [sic] before 2 p.m. _____________

☐ as notified by the United States marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

____

____

____

Defendant delivered on ______________ to ___________ at ________________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ___________________________
DEPUTY U.S. MARSHAL

ADDITIONAL IMPRISONMENT TERMS

60 months on each of Count 1, 2, 3, 4, 5, 6, 7, 8, and 9; and 15 months on each of Counts 11, 12, 13, 14, 15, 16, 17, and 18. The terms of imprisonment imposed on each of Counts 2 through 9 are to run concurrent to one another and consecutive to the term of imprisonment imposed on Count 1; and the terms of imprisonment imposed on each of Counts 11 through 18 are to run concurrent to one another and consecutive to the terms of imprisonment imposed on Counts 1 through 9.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years ______________.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

4 years on each of Counts 2 through 9 and 11, and 3 years on each of Counts 1, and 12 through 18; all to run concurrent to one another.

SPECIAL CONDITIONS OF SUPERVISION

During the time defendant is on supervised release defendant is to pay restitution, for which she is jointly and severally liable with Arthur Kissel, if convicted, Bernard Rish and Joseph Specktor, in the amount of $918,209.00 in monthly installments at a rate of 10 percent of her gross income into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007, for disbursement of restitution to victims listed on pages 8 through 9 of this judgment, pay the cost of supervised release during the time, if any, that her income exceeds $3,500.00 per month after taxes and after deducting restitution payments and then to the extent of 10 cents on the dollar up to the cost of supervised release, provide the Probation Office with access to financial information and seek the permission of the Probation Office before incurring new credit charges or opening any new lines of credit.

CRIMINAL MONETARY PENALTIES

The defendants shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$1,250.00	$	$ 918,209.00

☐ If applicable, restitution amount ordered pursuant to plea agreement ....$ ______________

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $ ______________

The defendant shall pay interest on any fines more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

☐ The interest requirements is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until __________. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payment shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Aetna	$203,703.00	$203,703.00	
Alden Life	$3,473.00	$3,473.00	
Blue Cross/ Blue Shield	$105,444.00	$105,444.00	
Chubb	$17,478.00	$17,478.00	
Cigna	$202,194.00	$202,194.00	
Extended Benefit	$10,141.00	$10,141.00	
GHI	$23,560.00	$23,560.00	
Great West	$29,849.00	$29,849.00	
Guardian	$90,221.00	$90,221.00	
Healthsource	$1,748.00	$1,748.00	
Oxford	$33,559.00	$33,559.00	
Mass Mutual	$3,789.00	$3,789.00	
NJHA	$10,535.00	$10,535.00	
NY Life	$8,850.00	$8,850.00	
Prucare	$2,372.00	$2,372.00	
Prudential	$19,770.00	$19,770.00	

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

UHC	$142,697.00	$142,697.00
Washington National	$8,827.00	$8,827.00
Totals:	$918,209.00	$918.209.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X In full immediately; or

B ☐ $ __________ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than __________; or

D ☐ in installments to commence __________ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in __________ (*e.g., equal, weekly, monthly, quarterly*) installments of $__________ over a period of _ year(s) to commence __________ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant is to pay the $1,250.00 special assessment immediately. As for restitution the $105,784.00 ordered forfeited by the defendant and all of defendant's liquid assets as of February 20, 2002 are to be paid forthwith into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007 for disbursement of restitution to the victims listed on pages 8 and 9 of this judgment and defendant will make restitution payments in monthly installments at a rate of 10 percent of her gross income during the time that she is on supervised release.

The Court found that defendant does not have the ability to pay a fine or the costs of imprisonment and supervised release except as set forth on page 7 of this judgment.

☐ The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States $105,794.00, which is to be disbursed as restitution payments to the victims through the account maintained by the Probation Office at the United States Courthouse for that purpose.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

ADDITIONAL DEFENDANTS HELD JOINT AND SEVERAL

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount
S3 1:98CR00251-002(MBM)	Arthur Kissel, if convicted	$318,209.00
1:00CR230-001(MBM)	Bernard Rish	$100,000.00
1:00CR00917-001(MBM)	Joseph Spektor	$28,585.00

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual finding and guideline application in this presentence report except (see attachment, if necessary):

SEE ATTACHED RIDER B AND ORDER

Guidelines Range Determined by the Court:

Total Offense Level: 33

Criminal History Category: 1

Imprisonment Range: 135 to 168 months

Supervised Release Range: 2 to 3 years on Cts 1, 12-18 to & 3 to 5 yrs on Cts. 2-9, 11 years

Fine Range: $ ____________ to $ ____________

X Fine waived or below the guideline range because of inability to pay.

Total Amounts of Restitution: $318,209.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

X The sentence departs from the guideline range:

upon motion of the government, as a result of defendant's substantial assistance.

X for the following specific reason(s).
SEE ATTACHED RIDER B

RIDER B

The Court found that the underlying fraud was more than $2.5 million but less than $5 million, and that the offense level before adjustments pursuant to U.S.S.G. § 2F1.1(a) and (b)(1) was 19 – 6 for fraud plus 13 for the amount of the fraud. The Court then made the following upward adjustments: (i) 2 points for more than minimal planning pursuant to USSG § 2F1.1(b)(2); (ii) 2 points for conduct involving the conscious risk of serious injury to others pursuant to U.S.S.G. § 2F1.1(b)(7)(A); (iii) 4 points for leadership role in an offense that included five or more participants pursuant to U.S.S.G. § 3B1.1(a); and (iv) 6 points for obstruction of justice pursuant to U.S.S. §§ 3C1.1 and 5K2.0. Accordingly, the Court found that the adjusted offense level to be 33; the criminal history category of I, and a sentencing range of 135-168 months.

2

Supreme Court, U.S.
FILED
OCT 27 2005
OFFICE OF THE CLERK

No. 05-81

In The
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

IN THE
SUPREME COURT OF THE UNITED STATES

SONIA LaFONTAINE

v.

Petitioner

UNITES STATES OF AMERICA

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

PETITION FOR REHEARING PURSUANT TO RULES 44 AND 34

October 25, 2005

Sonia Lafontaine, In Person
I.M # 415-37-054Inmate
FPC Alderson -Federal Prisom Camp
Glen Ray Dr. Box A,
Alderson, West Virginia 24910

Questions Presented

1. Was their a gross miscarriage of justice in this case? If Yes, Should the court should redress the said miscarriage of justice

2. Is denial of the righ to confront the witness whose plea allocution resulted in an 11 year sentence a misscarrage of justice where his evidence would have vinciated the defendant/petitioner?

3. Is it a miscarriage of justice to deprive the petitioner of her right to a fair hearing (due process) when the court's applied a patently wrong standard of review in respect of how her objection should have been preserved, and then applying a standard of review a sufficiency test rather than the harmless error or plain error test so as to determine that the plea allocution was harmless beyond a reasonable doubt.

4. Should any court have the power to deprive the petitioner of her 5th and 6th amendment right given the evils that flow from such a variation of the constitution and as set fourth in the case of Sir Walter Raleigh whose hanging resulted of his deprivation of the confrontation clause. Should the confrontation right be protected and enforced no matter what in order to safeguard the integrity of the American criminal justice system?

5. If the miscarriage of justice occurred, is the appropriate remedy to vacate the judgment of conviction and permit the peititioner to have a fair trial in accordance with the constitution, due process and the rule of law.

6. Was the order of the Court of Appeal erroneous and in itself an abuse of discretion and a miscarriage of justice. If yes, is the only remedy to vacate the judgment of conviction.

7. Should this petition for rehearing be treated as a motion to recall and set aside the judgment of conviction in accordance with Cahill v New York , New Haven & Hartford Railroad U.S.S.C., May 14, '956. No 436.

LIST OF PARTIES

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this petition.

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REASONS FOR GRANTING THE WRIT

To Correct a Gross Injustice resulting from a conviction based on a plea allocution which contributed and was wholly responsible for the judgment of conviction while the petitioner's right Confront that witness was deprived. The Court creating misapplied the standard of review to preserve the confrontation right and applied a sufficiency test instead of any harmless error beyond a reasonable le doubt standard constitution another miscarriage of justice. The Petitioner Objected to the use of Dr. Rish's Guilty Plea Allocution and Preserved her right to have the review made under the Harmless Error Beyond a Reasonable Doubt Standard and not the Plain Error Standard beyond a reasonable doubt, yet the court came applied a Sufficiency test..3

The Court failed to follow it's own president post Crawford..5
Even if the error was determined on the basis of Ordinary Error, the Write should be Granted 6

THE COURT BELOW MERELY APPLIED A SUFFICIENY TEST CONTRARY TO THE LAW 6

DIFFERENT APPLICATIONS AND STANDARDS OF REVIEW IS UNFAIR AND OUGHT NOT TO STAND 7

The use of the Dr. Rish Plea Allocution when beyond the bounds of ordinary prejudice and resulting irreparable injury and could not be harmless under any standard of review-which puts into question why and how the sufficiency test (a patently wrong standard of review) was applied to Lafontaine 8

The use of the allocution went way beyond the limiting instruction 8

Table of Authorities

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Dr 1 Hale See Lord Morley's Case, 6 How. St. Tr. 769, 770-771 (H. L. 1666); 2 Hale, supra, at 284; 1 Stephen, supra, at 358	9
King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584, at 165, 87 Eng. Rep., at 585.	9
Fenwick's Case, 13 How. St. Tr. 537, 591-592 (H. C. 1696) (Powys).	9

OPINION BELOW

The Summary Order of the U.S.C of Appeals for the Second Circuit affirming the Judgment of the District Court dated March 4, 2005 is reproduced here as Exhibit A at 1. The Order for the U.S. Court of Appeals for the Second Circuit, dated May 3, 2005 , which denied without opinion Petitioner's Petition for Rehearing is Appendix A at 6. This Court's Order, dated October 4, 2004, which correctly granted Petitioner's Petition for a Writ of Certiorari, vacated LaFontaine's Judgment of conviction, and remanded her case for further consideration in light of Crawford v Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) is Appendix A at 8. This Court's order dated October 3, 2005 denying the petitioner's writ for certiorari after the second circuit's consideration of Crawford, id. Is Exhibit A at 36. None of the above decisions were selected for publication in the Federal Reporter.

BASIS FOR JURISDICTION

The paragraphs above is incorporated here by reference. On October 3, 2005 this court denied the petitioner's writ of certiorari. There has been no application to extend the time period in which the Petitioner must be filed. Hence, this court has jurisdiction pursuant to, inter alia, Rule 44 and 28 U.S.C. §1254 (1).

Relevant Constitutional and Statutory Provisions

5th Amendment- The 5th amendment. The amendment is well known and holds that "No person shall be held to answer for a -- infamous crime-- not be deprived of life, liberty, or property without due process of law;

6th Amendment- In all criminal prosecutions, the accused shall enjoy the right to --be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor --

Both are abbreviated to the relevant points.

Statutory Provisions Misapprehended and Applied resulting in a serious injustice which this Court should cure

Rule 52 (a) and (b) Federal Rules of Criminal Procedure
(a) Harmless Error. Any error, defect irregularity, or variance that does not affect substantial rights must be disregarded.
(b) Plain Error. A plain error that affects *substantial rights may* be considered even though it was not brought to the Court's Attention.
Rule 901 (a) of the Federal Rules of Evidence
Rule 58 of the rules of the Unites States Supreme Court

STATEMENT OF THE CASE

Introduction

This Court's decision and its' opinion in Crawford v. Washington U.S. 124 S. Ct. 1354 (2004) has invalidated the premise that a person can be convicted on a plea allocution read to the jury during trial and to support closing arguments where the person whose plea allocution is not available for cross examination so that the truthfulness of that allocution can be tested and so that inferences made during trial can be corrected. Yet that is exactly the harm that fell upon LaFontaine. Hence, the reason for granting Defendant-Appellant Sonia LaFontaine's Petition is to correct an serious injustice that has resulted from in incorrect application of Crawford and the 5th and 6th amendments to upon which it is premised.

It is therefore, respectfully submitted that the court should grant the instant petition and either grant certiorari and summarily reverse the second circuit decision or simply recall the judgment without return to the second circuit pursuant to Rule 58 See Cahill v New York, id.

The Rish Allocation

The Rish Plea Allocution was read to the jury and then used to fill the gaps in the testimony of other witnesses. It is submitted that but not for the Rish Plea allocution, LaFontaine would have been found not guilty on all counts.

However, when Rish was called to testify, his counsel sent a letter stating that Dr. Rish would invoke his 5th amendment privilege making him unavailable to give evidence. As a result LaFontaine was deprived of conducting any cross examination on Dr. Rish, a witness whose evidence was entrenched throughout the whole trial.

It was Dr. Rish's Hospital reports, medical reports (all signed by him and bearing his name), pathology reports etc. which kept coming up as evidence of Dr. Rish. The deprivation of the right to cross examine Dr Rish was equivalent cutting her legs off. There was not possible way to mount a defence without cross examining this Dr. Rish (the central figure in this case) who all along used his professional status as a surgeon (indeed, he operated on LaFontaine when she was just 16) to abuse the petitioner.

It should be noted that this court's initial response was to vacate the judgment. However, when it remanded it, the Court of Appeal applied mistaken concepts of law to deprive the petitioner of her right to a fair trial and due process. The case ought to have been vacated and the Government given a chance to convict LaFontaine in a fair trial, that is one where she is not deprived of cross examining Dr. Rish. It is worth repeating that the name of the medical group was LaFontaine-Rish Medical Associates. Lafontaine is not a doctor but Rish is was a well known doctor/surgeon. This should have raised red flags.

It is not in dispute that the petitioners 5th and 6th Amendment right to cross examine Dr. Benito Rish was denied. See Supreme *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The error was not harmless beyond a reasonable doubt and affirming the conviction is an injustice that should be corrected to maintain integrity of the criminal justice system and the Courts.

REASONS FOR GRANTING THE WRIT

To Correct a Gross Injustice resulting from a conviction based on a plea allocution which contributed and was wholly responsible for the judgment of conviction while the petitioner's right Confront that witness was deprived. The Court creating misapplied the standard of review to preserve the confrontation right and applied a sufficiency test instead of any harmless error beyond a reasonable le doubt standard constitution another miscarriage of justice. The Petitioner Objected to the use of Dr. Rish's Guilty Plea Allocution and Preserved her right to have the review made under the Harmless Error Beyond a Reasonable Doubt Standard and not the Plain Error

Standard beyond a reasonable doubt, yet the court came applied a Sufficiency test.

It is not in dispute that LaFontaine objected to the use of the Dr. Rish Plea Allocution. In fact the Government conceded in it's November 12, 2004 letter (submitted to the Second Circuit after remand) that the use of the plea allocution was an error in light of Crawford. Id.

The Government argued, however, that the admissions was an plain error and that the this standard of review should be used. Regrettably, the second circuit adapted the Government's view. However, this is an injustice as LaFontaine did object and did preserve her objection.

However, under any standard of review, the plea allocution was prejudicial on a grand scale. The harm resulting from that prejudice cannot be cured by any correcting jury charge. The court misapprehended or failed to consider the facts by determining that the erroneous admission and use of Dr. Rish's Plea Allocution did not affect the outcome of the trial. To the contrary, but for the introduction of the Rish Plea Allocution, there would be no conviction. In the alternative, if Dr. Rish were called to give evidence, the jury would have realized that LaFontaine was a peon being used an manipulated by an experienced professional. Moreover, all of the evidence of Rish's control over LaFontaine (such as letters that he is trained and used her for many years, videos etc.) which the court did not admit would have painted a completely different picture of Lafontaine and Dr. Rish. And to a large extent, the case was about painting pictures. Except LaFontaine's canvas and hence her defence, was sliced in shreds when Dr. Rish's plea allocution was used but he could not be cross examined to challenge it and to introduce all of the other parts of the painting so that jury could have a full picture, not just the picture the government was able to present using the allocation.

To drive the point home, the allocution was prejudicial on a grand scale and resulted in irreparable harm which could only be cured by way of cross examination and now this court's reversal of the judgment below. Ref: Objection to Dr. Rish Plea Allocution Preserving the issue: see T. 1263-64 and T 748-49 and 1159.

The Court failed to follow it's own president post Crawford

In U.S.A. v McClain, 377, F.3d 219 (2^{d} Cir. 2004) the court held that the objection was preserved even though there were ambiguities. The McClain Court presumed that the objection was preserved for appellate review. See 377 F.3d at 322. It is submitted that the second circuit did not follow it's own precedent in McClain and that this alone justifies the writ being issued.

It must be remembered that in these cases the Government must show "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained" (Emphasis added). In a medical case with LaFontaine an assistant to a doctor and a doctor it is beyond peradventure (based on the record) that the Rish Plea allocution did contribute to the Verdict. In this case it was responsible for the verdict. If not for the Rish Allocution there would be no conviction. Hence, the Government could never have met shown the plea allocution did not contribute to the verdict and the judgement should have been vacated. That is one of the injustices this court ought to correct to safeguard the integrity of the system and of the court. (emphasis added).

The should ask itself, why in this case was the government relieved of that burden? Given the 2nd cir holding in McClain, that is an injustice which has put the petitioner behind bars.

Even if the error was determined on the basis of Ordinary Error, the Write should be Granted

Even if the court determined that the error should be determined on the basis of ordinary error, would still have to be proven beyond a reasonable doubt. The difference is that the onus shifts to the defendant. However, if the improperly admitted evidence, in this case contributed to the conviction, the conviction should be vacated, particularly where the petitioners constitutional right to confrontation is deprived. See U.S. v Bruno 383 F 3d 65 (2nd Cir) 2004). Rule 52 (b). Delaware v Van Arsdall, 475 U.S. 673 , 681 (1986); Chapman v California. 386 U.S. 18, 24 (1967) Holland v Scully, 797, F 2d 57, 67 (2d Cir. 1986); U.S v Jean-Baptiste, 166 F .3d 102, 108 (2d Cir. 1999); Henry v Scully, 918 F. Supp. 693, 718 (S.D.N.Y. 1995) aff'd 78 F.3d 51 (2nd Cir. 1996).

THE COURT BELOW MERELY APPLIED A SUFFICIENY TEST CONTRARY TO THE LAW

The test under either harmless error or plain error standards is whether the error was prejudicial beyond a reasons doubt (always). In the matter at bar, the Court below applied a mere sufficiency test. This alone justices setting aside the judgment of conviction. The injustice that flows from applying a sufficiency test when the harmless or plain error test beyond a reasonable doubt should be applied (regardless of who has the burden) deprived Lafontaine of any meaningful appeal makes the affirmation of conviction a miscarriage of justice that should not take place in an American Court. The injustice should and hopefully will be corrected by this Honorable Court. It should be noted that the plea allocution tainted all the evidence. This was the case in Kimmelman v Morrison, 477 U.S. 365 (1986). The fact that the error here was a supervening judicial decision that alters "a settled rule of law in the circuit, requires at least a modified plain error review where the government bears the burden. See Bruno, id. Citing US v Thomas 274 F. 3d 655n. 15 (2d Cir 2001) (en banc). And US v Santiago , 238 F.3d 213, 215 (2d Cir. 2001). But it must be remembered, that in this case a sufficiency test was applied, that's it. That is the miscarriage of justice which the court is urged to cure.

DIFFERENT APPLICATIONS AND STANDARDS OF REVIEW IS UNFAIR AND OUGHT NOT TO STAND

The court below's shifting theories of how an objection should be preserved, on how error is determined (including invoking the sufficiency test), and failure to apply consistent and correct standards of review of Crawford errors and issues seriously threatens the integrity of this court and the public reputation of the judicial process. The people in jail are swallowed up by the system. The system at least owes them a duty of care that assures due process and consistent and correct standards of review. None of that exists in this case. The end result is that there is a tremendous miscarriage of justice that to date has fallen through the cracks of the system.

The use of the Dr. Rish Plea Allocution when beyond the bounds of ordinary prejudice and resulting irreparable injury

and could not be harmless under any standard of review-which puts into question why and how the sufficiency test (a patently wrong standard of review) was applied to Lafontaine

The unlawful and erroneous use of the Dr. Rish Plea Allocution and introduction of all his medical reports and use of it to beef up the closing statement (to fill the gaps in the government's case) puts the use of the Rish Plea Allocution on it's own plain. Dr. Rish's plea allocution pointed the finger directly at LaFontaine since the name of the clinic was Lafontaine-Rish Medical Associates and all the medical reports had the name Lafontaine-Rish Medical Associates on it. One need go no further than the name of the clinic to point the finger at Lafontaine. The Crawford Judgment was meant to cure injustices. It is submitted that this case has slipped through the cracks and should be reversed.

The above abuses condoned by Crawford was augmented by the Governments use of the allocution with statements such as "it is directly relevant to the testimony of Reyes, T 750. Reyes had plead guilty to welfare fraud and fraudulent obtaining a govt loan while working at Lafontaine. Surely Rish's evidence was needed to fill the gap. T 750. . At T 1592 Dr. Rish said he didn't know that claims were being submitted for procedures not covered implicating the other person of the Lafontaine =Rish equation. If he didn't know, it must have been LaFontaine of the LaFontaine Rish Medical Group. Of course. Following this the Rish Plea allocution was invoked at least three more times to bolster weak evidence and testimony. The Government said: :You'll remember the surgeon for each one of the patients id Dr. Rish, and you know he's involved in the conspiracy." " The defendant told Ana Reyes, Don't worry about Dr. Rish, I'll take care of him. But most important you know he plead guilty". T 3299 (Emphasis Added). All of the documents with Dr Rish's name cannot be incorporated in this 10 pages, but they appear on almost every page of the trial transcript. The Rish plea allocution and it's use was an abuse of process and should not be permitted to stand post Crawford. The injustice of this alone threatens the integrity of the court.

The use of the allocution went way beyond the limiting instruction

The way the Rish allocution was an abuse of process and resulted in a miscarriage of justice. The limiting instruction could not and did not prevent the prejudice from the use cited above and in a post Crawford error, where standards of review should be adhered to, this case has resulted in a terrible and profound miscarriage of justice which this court should take the time to look into and cure. LaFontaine, (a Latino) who does not speak English well and misunderstands the plain meaning of many phrases, was swallowed up by the system. Yet even at this stage of her case with Crawford under her belt, the abuse of process in the use of the plea allocution (which is condemned in any event), a decision that she did not preserve her objection on the issue (which she did, supra) topped off by a standard of review of the error based on a sufficiency test. One must ask, why is LaFontaine being treated this way after a life of hard work and, until this incident, no criminal record. It is not legally important but merely turns up the manifest injustice magnified glass which this court should cure.

The evil of depriving a person of their confrontation right far outweighs any legal basis to justify it. The injustice was noted as far back as 1603 when Sir Walter Raleigh was hung, based on testimony from one Cobham. Raleigh argued that Cobham lied to save himself. A process that permeates the process today and was present in the Rish Plea Allocution. One of Raleigh's trial judges later lamented that "the justice of England was never so degraded and injured as condemnation of S.W Raleigh. England then limited these abuses. See Crawford, id. A sentence of 11 years for a crimes that in reality are subjective (was the procedure medically necessary? Was it performed pursuant to NY State Med Law?) is draconian (the proven fraud was 106,000.00 not a far cry from the hanging of Raleigh. The Dr. Rish plea allocution contributed to the conviction on a major scale. The deprivation of confront and cross examine Dr. Rish is as bad if not worse then Sir Walter Raleigh's deprivation, by the Privy Counsel in 1603, to confront Cobham. The injustice of confrontation was engrained in the constitution and should be strictly enforced to preserve the integrity of the American Justice System and so that it is not put into disrepute.
Confrontation is a right that every citizen should have access to, per se. It should not be legislated away by courts that give opinions that side step Crawford & which ultimately result in a defendant losing access to that right to confront their accuser. Such creative

opinions whether based on failure to preserve the objection, wrong standards of review and misapplied theories of law should not be tolerated. LaFontaine should have the right to cross examine Dr. Rish, as a matter of law and due process. Denial is a miscarriage of justice which should not be tolerated by this court. The judgments of conviction based on erroneous applications of the confrontation provisions should be set aside, *ab inito.*

There were a serious of English cases dealing with the right To face one's accuser. In King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584, at 165, 87 Eng. Rep., at 585., Paine was set Free because the accuser was dead and his accusatory Evidence could not be tested on cross examination. Also see Dr 1 Hale See Lord Morley's Case, 6 How. St. Tr. 769, 770-771 (H. L. 1666); 2 Hale, supra, at 284; 1 Stephen, supra, at 358King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584, at 165, 87 Eng. Rep., at 585. Fenwick's Case, 13 How. St. Tr. 537, 591-592 (H. C. 1696) (Powys).

The District Court permitted Dr. Rish, Dr. Zizza, Dr. Spektor Dr Saladin, and Dr. Guzman's medical reports in as evidence but all of the doctors took the 5th amendment and LaFontaine was further deprived of her right to confront witnesses. When LaFontaine attempted to introduce audio tapes which had be verified as being the doctors, the court refused to let the jury hear them. LaFontaine was deprived of a defence contributing to the miscarriage of justice.

Throughout the trial medical reports of Dr. Rish, Dr. Zizza, Dr. Spektor, Dr. Saladin and Dr. Guzman were introduced as testimonial statements since they were medical reports signed by N.Y State Licensed doctors. All of these doctors invoked the 5th amd privilege leaving LaFontaine no way to defend herself (after all, this was a medical case and the issues of what was done and if it was medically necessary or cosmetic fell squarely on the shoulders of the surgeons and anesthesiologists. LaFontaine had a right to cross examine them on their medical reports which were introduced as testimonial statements (evidence accusing Lafontaine). When LaFontaine tried to introduce tapes dictated by Dr. Spektor the district court held they were not admissible saying "how do we know Dr. Spektor didn't make them up to cover the fraud That is normally the role for the petite jury, not the court. LaFontaine had the tapes authenticated by Ana Reyes, an employee. Then the court went held only Dr. Spektor, who had invoked the 5th amd. could authenticate the tapes. Attempts to bring them in as business records of a licensed doctor kept pursuant to Medical law were also denied. Tr. 2163, 2164. All of the above constituted a gross miscarriage of justice given the fact that this was a medical case and only the doctors could clear Lafontaine once they were confronted with direct examination.

Conclusion

For all of the reasons set fourth above, supra, it is respectfully submitted that the court should grant the writ and set aside the judgment of conviction of the Court of Appeals as against Lafontaine. In the alternative, the court should recall and set aside the judgment of conviction pursuant to rule 58 to cure the gross injustice and protect LaFontaine's right to confrontation set fourth in the 5th & 6th amd. to the U.S. Constitution a promulgated by our founding fathers.

October 25, 2005

Sonia Lafontaine
In Person
I.M # 415-37-054
Inmate
FPC Alderson
Federal Prisom Camp
Glen Ray Dr. Box A
Alderson, West Virginia 24910

Assistance by: Arthur Froom
Per Power of Attorney, etc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 4th day of March, two thousand and five.

PRESENT:

HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges.

- x

UNITED STATES OF AMERICA,

Appellee,

-v.-

SONIA LAFONTAINE, aka
"Sonia Fromme,"

Defendant-Appellant,

ARTHUR KISSEL, aka
"Arthur Fromme,"

Defendant.

- x

SUMMARY ORDER
No. 02-1232
(Filed Mar. 4, 2005)

FOR APPELLANT: JOSHUA L. DRATEL, New York, NY

FOR APPELLEES: PAUL B. RADVANY, Assistant United States Attorney (David Kelly, United States Attorney for the Southern District of New York, *on the brief*), New York, NY.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Mukasey, C.J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED IN PART and REMANDED IN PART.

Defendant-appellant Sonia LaFontaine appeals from a judgment of conviction and subsequent sentence imposed by the United States District Court for the Southern District of New York (Mukasey, C.J.), following a six-week jury trial. The charges presented at trial all related to insurance fraud and money laundering schemes involving LaFontaine's cosmetic surgery clinic, LaFontaine-Rish Medical Associates ("LRMA"). This Court affirmed the conviction by summary order on February 12, 2004. *United States v. LaFontaine,* No. 02-1232, 87 Fed. Appx. 776, 2004 WL 260645 (2d Cir. Feb 12, 2004) (*"LaFontaine I"*). The mandate issued on March 4, 2004. On October 4, 2004, the Supreme Court vacated the judgment and remanded to this Court for further consideration in light of *Crawford v. Washington,* 541 U.S. 36 (2004). *LaFontaine v. United States,* 125 S. Ct. 46 (2004). This Court directed counsel to submit briefs in light of *Crawford* and *United States v. McClain,* 377 F.3d 219 (2d Cir. 2004). We assume the parties' familiarity with the factual and procedural background of this action.

The admission of Dr. Rish's plea allocution was error, in light of *Crawford*. *See McClain*, 377 F.3d at 222 (holding plea allocutions to be testimonial hearsay admitted in violation of Confrontation Clause when appellants lacked prior opportunity to cross-examine declarants). Because LaFontaine failed to preserve her claim, however, we review for plain error. *See id.* Plain error review requires a court to find "1) an error, 2) that is plain, 3) that affects substantial rights." *United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002). As we are satisfied that the first two requirements have been met, we concern ourselves only with the third. Plain error affects a defendant's substantial rights if the error is "prejudicial" and "affect[s] the outcome of the district court proceedings." *Id.* at 193 (internal quotation marks and citation omitted); *see also United States v. Keigue*, 318 F.3d 437, 441-42 (2d Cir. 2003).

The erroneous admission of the plea allocution did not affect the outcome of the trial proceedings. Other evidence adduced at trial overwhelmingly established both the existence of the conspiracy, as well as LaFontaine's participation in it. This evidence included, *inter alia*, the testimony of numerous former LRMA patients and employees establishing LaFontaine's hands-on role in the fraud, documentary evidence such as fabricated patient records created at LaFontaine's direction, and a tape recording in which LaFontaine instructed an LRMA employee to lie to the FBI regarding the case. The jury had before it evidence that LaFontaine owned, operated, and profited from the clinic, performed some of the surgical procedures that were fraudulently billed to insurance companies, supervised the corrupted billing process, tampered with witnesses, fabricated documents and destroyed authentic ones, and lied during her testimony. In addition, the allocution was admitted pursuant to a limiting instruction that the jury could use the admissions contained therein only as proof of the conspiracy's existence, and Dr. Rish's conduct in furtherance of it, and not as evidence that LaFontaine participated in the conspiracy.

LaFontaine further argues in her recent briefings that her Fifth Amendment right to present a defense was violated in light of *United States v. Chin,* 371 F.3d 31 (2d Cir. 2004), as the district court precluded the admission of tape recordings LaFontaine sought to introduce at trial. This argument lacks merit, for the reasons we stated in *LaFontaine I.*

LaFontaine has filed a motion for bail on the basis of *Crawford* and the Supreme Court's decision in *United States v. Booker,* 125 S. Ct. 738 (2005). In light of this Court's decision in *United States v. Crosby,* No. 03-1675, 2005 WL 240916, 2005 U.S. App. LEXIS 1699 (2d Cir. Feb. 2, 2005) this case is remanded to the district court for further proceedings in conformity with *Crosby.* The order previously issued in LaFontaine's appeal is reaffirmed in all respects except as modified by this order. Any appeal taken from the district court following this remand can be initiated only by filing a new notice of appeal. *See* Fed. R. App. P. 3, 4(b).

For the foregoing reasons, the district court's judgment is AFFIRMED IN PART and REMANDED IN PART. The motion for bail is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK

/s/ Lucille Carr
By:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May two thousand five.

(Filed May 3, 2005)

UNITED STATES OF AMERICA,

Appellee,

v. Docket # 02-1232

SONIA LAFONTAINE,
also known as Sonia Fromme,

Defendant-Appellant,

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Sonia Lafontaine. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Arthur Heller
Motion Staff Attorney

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 4, 2004

Mr. Joshua Lewis Dratel
14 Wall Street, 28th Floor
New York, NY 10005

Re: Sonia LaFontaine, aka Sonia Fromme
v. United States
No. 03-1540

Dear Mr. Dratel:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit, for further consideration in light of Crawford v. Washington, 541 U. S. ___ (2004).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

William K. Suter, Clerk

87 Fed.Appx. 776

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Sonia LAFONTAINE, aka "Sonia Fromme,"
Defendant-Appellant,
Arthur Kissel,
aka "Arthur Fromme," Defendant.

No. 02-1232.

Feb. 12, 2004.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Mukasey, C.J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Julia Pamela Heit and Vivian Shevitz, New York, NY, for Appellant.

Paul B. Radvany, Assistant United States Attorney (James B. Comey, United States Attorney for the Southern District of New York, on the brief; Gary Stein, Assistant

United States Attorney, of counsel), New York, NY, for Appellees.

PRESENT: *LEVAL, SOTOMAYOR,* and *WESLEY,* Circuit Judges.

SUMMARY ORDER

Defendant-appellant **Sonia LaFontaine** appeals from a judgment of conviction and subsequent sentence imposed by the United States District Court for the Southern District of New York (Mukasey, C.J.), following a six-week jury trial. The charges presented at trial all related to insurance fraud and money laundering schemes involving LaFontaine's cosmetic surgery clinic, LaFontaine-Rish Medical Associates ("LRMA"). On appeal, LaFontaine raises various challenges to her conviction and sentence, all of which we find to be without merit.

LaFontaine argues that, as part of its plea agreement with Dr. Rish, whereby the government was permitted to introduce Rish's plea allocution as evidence against LaFontaine, the government was obliged to immunize Rish, or otherwise require him to testify at LaFontaine's trial. Because LaFontaine never raised this claim before the district court, we review for plain error, *United States v. Brown,* 352 F.3d 654, 663 (2d Cir.2003); *see also United States v. Crowley,* 318 F.3d 401, 415 (2d Cir.2003) (defining "plain error" as that which is a "clear or obvious deviation from current law that affected the outcome of the district court proceedings") (internal quotation marks omitted), and find none. Plea allocutions of co-conspirators have routinely been introduced into evidence without the attendant requirement that the pleading co-conspirator testify at another defendant's trial. *See United States v. Petrillo,* 237 F.3d 119 (2d Cir.2000); *United States v. Moskowitz,* 215 F.3d 265 (2d Cir.2000). This is particularly the case where, as here, the pleading co-conspirator has not been granted immunity, and therefore, is free to invoke his Fifth Amendment right not to testify. To the extent that LaFontaine argues that the district court should have compelled Rish's immunization, this claim is unavailing. "Absent extraordinary circumstances, the Due Process Clause imposes no requirement that defense witness immunity be ordered" by the court. *United States v. Diaz,* 176 F.3d 52, 115 (2d Cir.1999) (internal quotation marks and citation omitted). Where, as here, "the witness [himself] is a prosecution target," such extraordinary circumstances do not exist. *United States v. Shandell,* 800 F.2d 322, 324 (2d Cir.1986). Moreover, because LaFontaine did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense, the district court was under no obligation to compel Rish's immunization.[1]

LaFontaine also challenges the district court's decision to exclude dictation tapes, which she claims were "made by doctors who had performed medical procedures on patients named in the indictment," for lack of authentication. Reviewing the district court's exclusion of the tapes for abuse of discretion, *United States v. Taubman,* 297 F.3d 161, 164 (2d Cir.2002), we find none. LaFontaine argues that she was unable to authenticate the tapes, as required by Fed.R.Evid. 901(a), because the doctors heard on the tapes were unavailable to testify. The court, however, invited LaFontaine to use alternative means to authenticate the tapes, and she failed to do so. To the extent that LaFontaine argues that the tapes were admissible under Rule 806 for impeachment purposes, such a claim was not raised below, and is now reviewed for plain error. *See Crowley,* 318 F.3d at 414. Because the government did not introduce hearsay statements by the doctors at trial, the challenged tapes could not have been used for impeachment purposes. Further, because LaFontaine has failed to show that introduction of the tapes would have resulted in her acquittal, there was no plain error.

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[1] We note that, in her brief, LaFontaine argued that the district court should have compelled the government to immunize Drs. Spektor and Zizza in order to permit them to testify at trial. At oral argument, however, LaFontaine conceded that this claim was without merit, as Drs. Zizza and Spektor had not reached agreements with the government at the time of trial.

LaFontaine next contends that the district court abused its discretion by excluding certain witness testimony on the ground that it was irrelevant or cumulative. Trial courts enjoy broad discretion over the admission of evidence, and this Court "will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir.1998) (internal quotation marks omitted). There is no such showing here. In our view, the excluded testimony of the various prospective witnesses was either irrelevant, cumulative, collateral, or at worst harmless error.

LaFontaine also claims that the district court's refusal to adjourn the trial and authorize the deposition of Arthur Kissel, LaFontaine's husband and co-defendant, constituted an abuse of discretion because it "undermined [her] right to present a balanced defense." The decision to permit or deny leave to conduct a Rule 15 deposition "rests within the sound discretion of the trial court." *United States v. Gigante,* 166 F.3d 75, 81 (2d Cir.1999) (internal quotation marks and citation omitted). There is no indication that the district court's decision constituted an abuse of discretion.

LaFontaine also contends that the district court abused its discretion by excluding statements made by Dr. Rish and Kissel to Kristine Haave, the fraud investigator who testified at trial. These statements, LaFontaine maintains, were admissible under Rule 801(d)(2)(E) as statements by a co-conspirator made in furtherance of a conspiracy. Because Rule 801(d)(2)(E), however, requires that the party against whom the statement is offered be a party to the conspiracy, it is clear that such a statement may not be introduced against the government in a criminal case. *See United States v. Abbas,* 74 F.3d 506, 511 (4th Cir.1996); *United States v. Kapp,* 781 F.2d 1008, 1014 (3d Cir.1986). To the extent that LaFontaine argues that the statements were also admissible under Rule 806, this argument was not raised below, and we find no plain error in the district court's ruling. Rule 806 permits the use of such evidence for impeachment purposes; here, however, LaFontaine sought to introduce the statements to prove the truth of the matter asserted – that Kissel and Rish committed the billing fraud. Further, LaFontaine fails to show that she was unduly prejudiced by the exclusion, as the "exculpatory" nature of the statements is not apparent. Thus, these statements were properly excluded.

We reject LaFontaine's claim that the district court abused its discretion by excluding expert testimony that certain medical procedures could be delegated to unlicensed individuals on the ground that the testimony was irrelevant to the issues presented at trial. For substantially the reasons stated by the district court at trial, the proposed expert testimony was irrelevant to the fraud issues raised at trial and was properly excluded. To the extent that LaFontaine objects to the district court's decision not to charge the jury on the permissibility of delegation to unlicensed individuals under New York law, we also reject her claim. LaFontaine has not shown that the requested charge "accurately represented the law in every respect," and that she was prejudiced by the charge given. *United States v. Mulder,* 273 F.3d 91, 105 (2d Cir.2001). Indeed, the requested charge was an incorrect statement of New York law, and LaFontaine was not prejudiced by the charge given, as the district court properly charged the jury on all of the elements of the government's case. Accordingly, LaFontaine's claim fails.

LaFontaine challenges her sentence on a number of grounds. First, she argues that the district court erred in denying her a *Fatico* hearing, thereby precluding her from presenting evidence concerning her role in the offense and the amount of loss for which she was responsible. Reviewing the district court's decision for abuse of discretion, *United States v. Slevin,* 106 F.3d 1086, 1091 (2d Cir.1996) (noting that the district court enjoys broad discretion to determine the procedure by which sentencing issues will be resolved, so long as the defendant is given the opportunity to rebut the government's allegations), we find none. Where, as here, the district court concluded that the defendant had ample opportunity at trial and in her sentencing submissions to rebut the government's allegations concerning role and loss amount, it was under no obligation to hold a *Fatico* hearing.

Second, LaFontaine also contends that the sentencing court improperly calculated the loss involved in the offense. Specifically, LaFontaine claims that the court should have discounted the "intended loss" – the full amount of LaFontaine's fraudulent claims – because LaFontaine knew when the claims were submitted that LRMA would not be reimbursed for the full amount. She further argues that, because the patients received some treatment, the intended loss figure should be discounted to reflect the amount that would have been reimbursed by the insurance companies for the procedures that were actually performed. We find no clear error in the district court's calculation. *United States v. Franklyn,* 157 F.3d 90, 97 (2d Cir.1998). The district court need not compute the loss sustained "with precision," but rather, "need only make a reasonable estimate of the loss, given the available information." *United States v. Jacobs,* 117 F.3d 82, 95 (2d Cir.1997) (quotation marks and citation omitted). For substantially the reasons set forth by the court at sentencing, we agree that the government's loss calculation was a conservative calculation upon which the court could rely in determining the loss amount.

Third, LaFontaine also argues that the district court's upward departure for multiple acts of obstruction of justice was improper, and that the court should have imposed the standard two-level departure mandated by U.S.S.G. § 3C1.1. Although § 3C1.1 provides a two-level enhancement for obstruction of justice, it is well settled that a sentencing court may depart upwardly if a defendant engages in "multiple acts of obstruction" that fall outside the heartland conduct contemplated by § 3C1.1. *United States v. Ventura,* 146 F.3d 91, 97 (2d Cir.1998). Reviewing the sentencing court's decision to depart upwardly for reasonableness, *see* 18 U.S.C. § 3742(e)(3)(c), we find that, for substantially the reasons stated by the court at sentencing, the court's six-level enhancement was eminently reasonable given LaFontaine's various and numerous acts of obstruction.

Fourth, LaFontaine further contends that the district court's imposition of a two-level enhancement for conscious or reckless risk of serious bodily injury was an abuse of discretion because the injuries claimed by LRMA patients were "normal complaints of surgical recovery," and the procedures performed by LaFontaine did not pose a risk of serious bodily injury. For substantially the reasons provided by the court at sentencing, we agree that LaFontaine's conduct exposed LRMA patients to "the conscious or reckless risk of serious bodily injury," U.S.S.C. § 2F1.1(b)(4)(A) (1997), and in some cases, actually resulted in injuries to patients. Accordingly, the two-level enhancement was proper.

Fifth, LaFontaine also maintains that the district court's imposition of U.S.S.G. § 3B1.1's leadership role enhancement was improper because she was not a leader or organizer of the conspiracy. She further claims that the sentencing court improperly relied on evidence related to the offense conduct, rather than her role in the offense, in determining whether the role enhancement was applicable. We disagree. The reasons set forth by the court at sentencing clearly indicate that the court properly applied the leadership enhancement.

Sixth, LaFontaine further maintains that the sentencing court's decision not to depart downwardly, based on the alleged disparity between her sentence and that of her co-conspirators Drs. Rish and Spektor, was an unconstitutional application of the Sentencing Guidelines. We have established that a disparity in the sentences of co-defendants "is not a proper basis for [a] downward departure," *United States v. Tejeda,* 146 F.3d 84, 87 (2d Cir.1998) (internal quotation marks omitted), even where the disparity is the result of prosecutorial discretion in the plea bargaining process, *United States v. Stanley,* 928 F.2d 575, 579-82 (2d Cir.1991). As the sentencing court noted, LaFontaine "was in a different position from that of the other defendants," as she profited from the scheme far more than did Drs. Rish and Spektor. Given these considerations, it is clear that the court's decision not to exercise its departure authority was not clearly erroneous.

Finally, LaFontaine contends that the sentencing court erred in failing to group the money laundering charges with the fraud charges, as required under the November 2001 Sentencing Guidelines. This claim is completely without merit. The sentencing court correctly applied the November 1997 Sentencing Guidelines, which did not require grouping of the fraud and money laundering charges, but were more favorable to LaFontaine than the November 2001 Sentencing Guidelines. *See United States v. Sabbeth,* 277 F.3d 94, 99 (2d Cir.2002) (requiring that the district court apply the Guidelines version in effect at the time of the offense conduct if it would result in a less severe sentence than the version in force at the time of sentencing). Under the November 1997 Sentencing Guidelines, money laundering and fraud charges are not grouped unless they are tightly interwoven and involve the same victims. *See* U.S.S.G. § 3D1.2(a) (1997). As the sentencing court noted here, the charges were not tightly interwoven and involved two different sets of victims – the insurance companies, and the banking system and society at large. Accordingly, the sentencing court's decision not to group these charges was appropriate.

For these reasons, the judgment of the district court is AFFIRMED.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 20th day of October, two thousand and four,

Present:

Hon. Pierre N. Leval,
Hon. Sonia Sotomayor,
Hon. Richard C. Wesley,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

SONIA LAFONTAINE,
also known as Sonia Fromme,
Defendant-Appellant,

ARTHUR KISSEL,
also known as Arthur Fromme,
Defendant.

Docket No. [s]: 02-1232
(Filed Oct. 20, 2004)

Before determining what is the appropriate disposition of the above case following the remand from the Supreme Court, the panel directs counsel to respond with their views on that disposition in light of *Crawford v. Washington*, 124 S.Ct. 1354 (2004), and *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004).

Such-response from counsel is to be filed with the Clerk of the court no later than two (2) weeks from the date of this Order, and be limited to a brief that may be in the form of a letter, not to exceed five (5) pages. Response briefs of no more than three (3) pages may be filed by counsel for both parties within one (1) week thereafter.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA

v.

SONIA LAFONTAINE,
a/k/a "Sonia Froom"

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
S3 1:98CR.00251-001(MBM)

John Pollok, Susan Wolffe and Roger Bennett Adler
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) ____________________

☐ pleaded nolo contendere to count(s) _______________ which was accepted by the court

XX was found guilty on count(s) one through nine, eleven through eighteen, and the forfeiture allegation after a plea of not guilty

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to commit mail and health fraud	In or about early 1998	1
18 U.S.C. §§ 1341 and 2	Mail fraud	8/31/95	2

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

____

Count(s) ________________ ☐ is ☐ are dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 584-03-7735	February 20, 2002 Date of Imposition of Judgment
Defendant's Date of Birth: August 8, 1946	/s/ [Illegible] Signature of Judicial Officer
Defendant's USM No. 41537-054	Michael B. Mukasey, U.S.D.J. Name and title of Judicial Officer
Defendant's Residence Address:	March 15, 2001 Date

61 West 62nd Street
Apartment 23F
New York New York 10023

Defendant's Mailing Address:

61 West 62nd Street
Apartment 23F
New York New York 10023

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/24/95	3
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/17/95	4
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/18/94	5
18 U.S.C. §§ 1341 and 2	Mail Fraud	12/27/95	6
18 U.S.C. §§ 1341 and 2	Mail Fraud	5/20/96	7
18 U.S.C. §§ 1341 and 2	Mail Fraud	8/9/95	8
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/20/95	9
18 U.S.C. §§ 1347 and 2	Health care fraud	In or about early 1998	11
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about late 1996	12
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about 1998	13
18 U.S.C. § 1956(h)	Conspiracy to engage in monetary transaction with criminally derived property	In or about 1998	14

18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	12/11/95	15
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	2/23/96	16
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	4/2/96	17

RIDER A

Title & Section	Nature of Offense	Date Offense Concluded	Count #
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	6/27/96	18
18 U.S.C. § 982	Forfeiture Allegation	N/A	No #

On motion by the government the superseded indictment, and superseding indictments S1 98 Cr. 251 (MBM) and S2 98 Cr. 251 (MBM) are dismissed as to defendants Sonia LaFontaine; as is Count 10 of superseding indictment, S3 98 Cr. 251 (MBM).

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 135 months.

X The court makes the following recommendations to the Bureau of Prisons:
Consistent with defendant's security classification as designated by the United States Bureau of Prisons and the length of her sentence, defendant should be assigned to a correctional facility as close to Florida as possible where she can receive appropriate medical treatment.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at __________ ☐ a.m. ☐ p.m. on ______________
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of [sic] before
2 p.m. ____________

☐ as notified by the United States marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

____

____

____

Defendant delivered on _____________ to __________
at _______________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By _______________________
DEPUTY U.S. MARSHAL

ADDITIONAL IMPRISONMENT TERMS

60 months on each of Count 1, 2, 3, 4, 5, 6, 7, 8, and 9; and 15 months on each of Counts 11, 12, 13, 14, 15, 16, 17, and 18. The terms of imprisonment imposed on each of Counts 2 through 9 are to run concurrent to one another and consecutive to the term of imprisonment imposed on Count 1; and the terms of imprisonment imposed on each of Counts 11 through 18 are to run concurrent to one another and consecutive to the terms of imprisonment imposed on Counts 1 through 9.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned-by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

4 years on each of Counts 2 through 9 and 11, and 3 years on each of Counts 1, and 12 through 18; all to run concurrent to one another.

SPECIAL CONDITIONS OF SUPERVISION

During the time defendant is on supervised release defendant is to pay restitution, for which she is jointly and severally liable with Arthur Kissel, if convicted, Bernard Rish and Joseph Specktor, in the amount of $918,209.00 in monthly installments at a rate of 10 percent of her gross income into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007, for disbursement of restitution to victims listed on pages 8 through 9 of this judgment, pay the cost of supervised release during the time, if any, that her income exceeds $3,500.00 per month after taxes and after deducting restitution payments and then to the extent of 10 cents on the dollar up to the cost of supervised release, provide the Probation Office with access to financial information and seek the permission of the Probation Office before incurring new credit charges or opening any new lines of credit.

CRIMINAL MONETARY PENALTIES

The defendants shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$1,250.00	$	$ 918,209.00

☐ If applicable, restitution amount ordered pursuant to plea agreement .... $ ______________

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $ ______________

The defendant shall pay interest on any fines more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

☐ The interest requirements is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until __________. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payment shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Aetna	$203,703.00	$203,703.00	
Alden Life	$3,473.00	$3,473.00	
Blue Cross/ Blue Shield	$105,444.00	$105,444.00	
Chubb	$17,478.00	$17,478.00	
Cigna	$202,194.00	$202,194.00	
Extended Benefit	$10,141.00	$10,141.00	
GHI	$23,560.00	$23,560.00	
Great West	$29,849.00	$29,849.00	
Guardian	$90,221.00	$90,221.00	
Healthsource	$1,748.00	$1,748.00	
Oxford	$33,559.00	$33,559.00	
Mass Mutual	$3,789.00	$3,789.00	
NJHA	$10,535.00	$10,535.00	
NY Life	$8,850.00	$8,850.00	
Prucare	$2,372.00	$2,372.00	
Prudential	$19,770.00	$19,770.00	

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

UHC	$142,697.00	$142,697.00
Washington National	$8,827.00	$8,827.00
Totals:	$918,209.00	$918,209.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X In full immediately; or

B ☐ $ ___________ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____________; or

D ☐ in installments to commence _______________ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in ____________ (*e.g., equal, weekly, monthly, quarterly*) installments of $___________ over a period of _ year(s) to commence _____________ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant is to pay the $1,250.00 special assessment immediately. As for restitution the $105,784.00 ordered forfeited by the defendant and all of defendant's liquid assets as of February 20, 2002 are to be paid forthwith into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007 for disbursement of restitution to the victims listed on pages 8 and 9 of this judgment and defendant will make restitution payments in monthly installments at a rate of 10 percent of her gross income during the time that she is on supervised release.

The Court found that defendant does not have the ability to pay a fine or the costs of imprisonment and supervised release except as set forth on page 7 of this judgment.

☐ The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States $105,794.00, which is to be disbursed as restitution payments to the victims through the account maintained by the Probation Office at the United States Courthouse for that purpose.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

ADDITIONAL DEFENDANTS HELD JOINT AND SEVERAL

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount
S3 1:98CR00251-002(MBM)	Arthur Kissel, if convicted	$318,209.00
1:00CR230-001(MBM)	Bernard Rish	$100,000.00
1:00CR00917-001(MBM)	Joseph Spektor	$28,585.00

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual finding and guideline application in this presentence report except (see attachment, if necessary):

SEE ATTACHED RIDER B AND ORDER

Guidelines Range Determined by the Court:

Total Offense Level: 33

Criminal History Category: 1

Imprisonment Range: 135 to 168 months

Supervised Release Range: 2 to 3 years on Cts 1, 12-18 to & 3 to 5 yrs on Cts. 2-9, 11 years

Fine Range: $ ______ to $ ______

X Fine waived or below the guideline range because of inability to pay.

Total Amounts of Restitution: $318,209.00

- ☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).
- ☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.
- ☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

X The sentence departs from the guideline range:

upon motion of the government, as a result of defendant's substantial assistance.

X for the following specific reason(s).
SEE ATTACHED RIDER B

RIDER B

The Court found that the underlying fraud was more than $2.5 million but less than $5 million, and that the offense level before adjustments pursuant to U.S.S.G. § 2F1.1(a) and (b)(1) was 19 – 6 for fraud plus 13 for the amount of the fraud. The Court then made the following upward adjustments: (i) 2 points for more than minimal planning pursuant to USSG § 2F1.1(b)(2); (ii) 2 points for conduct involving the conscious risk of serious injury to others pursuant to U.S.S.G. § 2F1.1(b)(7)(A); (iii) 4 points for leadership role in an offense that included five or more participants pursuant to U.S.S.G. § 3B1.1(a); and (iv) 6 points for obstruction of justice pursuant to U.S.S. §§ 3C1.1 and 5K2.0. Accordingly, the Court found that the adjusted offense level to be 33; the criminal history category of I, and a sentencing range of 135-168 months.

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-001

William K. Suter
Clerk of the Court
202-479-3011

October 3, 2005

Mr. Josha Lewis Dratel
14 Wall Street, 28th Floor
New York, N.Y. 10017

RE: Sonia LaFontaine
v. United States
No 05-81

Dear Mr. Dratel:

The Court today entered the following order in the above entitle case:

The Petition for writ of certiorari is denied.

Sincerely,
Scroll/William K Suter
William K. Suter, Clerk